LECTURES,

ELEMENTARY AND FAMILIAR,

ON

English Law;

BY

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COUNTY COURT JUDGE.

Together let us beat this ample field
Try what the open what the covert yield'

— — —

SECOND SERIES.

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CORRIGENDA.

Page 48, „ 23, *for* "seems," *read* "serve."

„ 74, „ 28, *for* "three years' imprisonment," *read* "imprisonment for not more than three years."

„ 112, „ 4, *dele the second comma.*

SERIES II.

INTRODUCTION.

At the conclusion of the First Series of my Lectures I said that I should, in the beginning of the next series, explain to you some extensive changes of some of the branches of the common law, effected by modern acts of parliament. The promise thus made, I now proceed to perform.

The instances which I shall select of branches of the law greatly changed by recent legislation will be readily perceived to be of the first importance. In dealing with them, the discursive character of these Lectures will be retained; experience and the opinions of others justifying me in no longer regarding this as a fault, in an attempt to teach younger students the elements of a science comprehending so vast a variety of titles, as are comprised in English Law. For their instruction and use it is possible to select parts which may attract and interest them, when they might be repelled by a formal attempt to reduce the whole to a system.

LECTURE XL.

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At the beginning of my third lecture, I said that it would be difficult to find a title or head of the common law, the details of which have not been altered by acts of parliament. This assertion may be illustrated by a few remarkable examples.

Firstly, I mention trial by jury. Of the details of this mode of trial, to which, as history has taught you, our ancestors attributed great importance, regarding it as one of the safeguards of the liberties which they asserted and have transmitted to us, some parts remain unchanged. The changes which have been made suggest many interesting reflections.

Acts of parliament have established exceptions to the rule, that a jury is the proper tribunal for the trial of questions of fact. By an act of parliament passed in

1854, called the Common Law Procedure Act (*a*), and to which I shall have very frequent occasion to refer, it is provided in the first section, to the effect, that the parties to any cause may leave the decision of any question of fact to the court: and such question of fact may thereupon be tried and determined by any judge who might otherwise have presided at the trial thereof by jury, either with or without the assistance of any other judge or judges of the same court, or included in the same commission at the assizes. Looking at the section, you will perceive that I have contented myself with stating its general purport. I recommend you to make yourself familiar with its details.

Up till the time I am writing, the power thus given to parties to dispense with a jury has been rarely exercised; but its existence, applicable as it is to many hundreds of causes every year, entitles the law which gives it to a place in this part of my lectures.

It is different in the county courts,—new tribunals of limited jurisdiction, substituted in 1847 for very ancient common law courts, which were also called county courts. In these new courts, questions of fact are tried by the judge only, without a jury, unless either party requires a jury. Even this may be done only in some cases. This right to require trial by jury is exercised in comparatively very few cases. It seems that, whether in the superior courts, or in the inferior courts, the suitors are content with the ordinary course of law: in the former, rarely dispensing with juries; in the latter, rarely requiring them.

Soon after the passing of the Common Law Procedure Act, I wrote a paper which was printed in the Law Magazine, on the subject of the power given by the act to litigating parties to withdraw from the consideration of juries questions of fact. As this paper contains a great deal of the sort of instruction which it is my aim to impart, I shall repeat the substance of it in my next lecture.

(*a*) 17 & 18 Victoria, chapter 125.

The enactments just referred to apply only to what are called civil proceedings, in which questions are decided between parties in litigation, as plaintiffs and defendants. There is reason to think that the preference which in all former times has prevailed in this country for trial by jury is wearing out as respects civil causes.

In criminal proceedings, the common law has built upon the usage to try questions of fact by means of a jury another custom, namely, that a person accused of a felony is to be tried by his peers: pares, equals.

In a future lecture I shall say a great deal of this privilege as enjoyed by lords of parliament. At present, I am referring only to commoners, the privilege of each of whom it is, when charged with felony, to be tried by a jury consisting of twelve of his peers. Commoners in former times, when political strife led some men to actual treason and sedition, and others to make unfounded charges of those crimes, this privilege of trial by jury, and not by judges who were ministers of the Crown, then removable at pleasure, was of the highest value to every Englishman. At a glance you perceive that my present allusions are chiefly to the reigns of Charles the Second and James the Second; and more especially to the case of the seven bishops, who, though lords of parliament, were tried by a jury, by reason of the crime with which they were charged being a misdemeanor and not a felony.

Even now, when the independence of the judges is secured against the influence of the Crown by law and by public opinion, it will be well for the people to guard jealously an institution which may, should troubled times recur, again shield patriots from persecution.

The last remarks are introductory to my stating to you the effect of what may appear, from the subject matter of it, an infringement, however slight, on the privilege which every man has to be tried by his peers. The new law I am about to state works very beneficially; but, in future

legislation, care must be taken to stop short of the danger of impairing further the valuable right of trial by jury. The hackneyed simile of the thin end of the wedge is apposite.

In the year 1855, a statute called the Criminal Justice Act (*a*) was passed; the first and second sections give to two or more justices of the peace sitting in petty sessions a jurisdiction which they may exercise if they think fit, and if the accused consent to submit to it, to hear and determine charges of simple larceny, of property the value of which does not exceed five shillings: and charges of attempts to commit larceny from the person, or simple larceny. Under these sections, a sentence may be imprisonment with or without hard labour, for any period not exceeding three calendar months. Many accused persons consent to be tried at the petty sessions, thus avoiding imprisonment before trial, as well as the chance of severer punishments, which may be inflicted at the assizes or quarter sessions, than at the petty sessions.

The third section gives to justices in petty sessions a jurisdiction which they may exercise, if they think fit, when a person pleads guilty to a charge of simple larceny of property of greater value than five shillings, or of stealing from the person, or of larceny as a clerk or servant. Under this section, a sentence may be imprisonment with or without hard labour for any term not exceeding six calendar months. As this third section provides only for cases of accused persons pleading guilty, it is by the first and second sections that the point of the wedge may be said to be inserted.

A lecture on the constitution of various courts will be the proper place for an explanation of the difference between the court of quarter sessions, in which justices of the peace have, throughout their whole county, jurisdiction in respect of many important subjects, and a court of petty

(*a*) 18 & 19 Victoria, chapter 126.

sessions having, within a district of the county, jurisdiction in respect of certain specified subjects.

The statute so draws attention to the difference between simple larceny and other larceny, that I find this a most convenient place for impressing it on your minds.

The word larceny, latrociny, derived from latrocinium, is our technical word for theft. Now theft is either simple or compound; simple when it is only a removal of property with a felonious intent to deprive the owner of it; compound when the felonious intent is complicated or aggravated by other circumstances, such, for example, as the fact of the theft being from the person of the owner, or that of the thief being the owner's servant, or of the theft being from a dwelling-house. Bear this distinction in mind, and read again my condensed statement of the effect of the three clauses.

I venture an attempt to illustrate the technical phrases of one science by a reference to similar technical phrases of another and very different science: surgery. A surgeon speaks of a simple fracture when the parts of a broken bone remain in their right places, ready to be united by a natural process. He speaks of a compound fracture when the mischief is complicated or aggravated by the fragments, or one of them, piercing the adjoining muscle, and being, therefore, more difficult to be reduced. The analogy appears perfect between the use by persons of one profession of the words simple and compound, and the use of the same words by the members of another profession. Simple, simplex, sine plexis, without complication. Compound, complicated.

As to the number of men to form a jury, the law is unchanged as respects all courts, whether of civil or criminal jurisdiction, except one. The number is, as always, still twelve, except in the county courts, in which the number is directed by an act of parliament to be five.

Most of the practical details in respect of juries, for instance, as to the preparation of lists of persons qualified

and liable to serve as jurymen, as to the selection of persons to serve, as to the mode of summoning them, are minutely regulated by acts of parliament.

Challenges, that is, objections which may be made to persons summoned to serve on a jury, are partly regulated by acts of parliament, but chiefly by the common law. For the rules respecting them I refer you to the very clear account which Stephen gives of them in his Commentaries. Challenges, rare in large counties, are occasionally made in small counties and in municipal jurisdictions; and the law respecting them is well worthy of your attention.

A part of the common law which remains unchanged, is that which requires a jury to give a unanimous verdict. A verdict cannot be received unless all the jurymen, whether twelve or five, agree to it. But the practice is for the court, after the lapse of a reasonable time, to discharge them, if they cannot agree. After this, the same question may be tried by another jury.

Attempts have been latterly made so to change the law as to dispense with the unanimity required of juries. It is an argument in favour of the proposed change that it seems unreasonable to require the unanimity of twelve men on a point which would not be brought before them were it not the subject of controversy, and to enforce their unanimity by imprisonment, aggravated by cold and hunger. You know that jurymen not agreeing are locked up, and may not, during their confinement, be supplied with food or fire. Few subjects have been better debated in parliament than this was in the House of Lords, when a bill was proposed to effect the suggested change. Of the arguments which prevailed against the bill, the most convincing appeared to be, that to require unanimity is one way of enforcing thorough discussion on the part of the jury; to receive the verdict of a majority is to dispense with discussion, and to encourage each man to vote according to his first impression.

This last argument applies, though less strongly, to the

wish, which some have, that an English jury, deciding in a criminal cause, should have power, as a Scotch jury has, to find the charge "Not Proven." True it is that the Scotch practice is more logical than the English, which forces a jury to say either "Guilty" or "Not Guilty," inasmuch as in the majority of cases in which the latter verdict is given, the accused person is acquitted, not because he is proved or even thought to be innocent, but because he is not clearly proved to be guilty. In favour of our practice it may be said, that a Scotch jury may escape the necessity of a thorough discussion of the question of guilty or not guilty, by too readily adopting a verdict of "Not Proven."

In the case of what is called a grand jury, more properly called a grand inquest, unanimity is not requisite. The chief function of a jury of this sort is, as you know, to enquire as to the truth of any written charge brought before it, called a bill, alleging any person to have been guilty of a crime. If, after hearing evidence, the grand jury think it sufficient, if not answered or explained, to justify a verdict of guilty, they find the written charge laid before them a true bill: and it is after that called an indictment. As I said just now, a grand jury need not be unanimous: but, in order that a bill may be found true, it is necessary that a majority, consisting of at least twelve, agree so to find it. For this reason, there must not be less than thirteen, and not more than twenty-three men to form a grand jury.

On the subject of grand juries, comparatively with other juries, there has been but little legislation.

Many persons think that grand juries are needless, and that they should be abolished, substituting for them a public prosecutor, whose function should be to investigate the evidence against persons accused of crimes, and to exercise a discretion like that of the grand jury to prefer or withhold the charges. Every charge sanctioned by him would be of the nature of an indictment, upon which the accused might be tried. This subject has been well debated

in the House of Lords. Against the proposed change one of the arguments is entitled to great weight, namely, that the public prosecutor would be a minister of the Crown, and under its influence: and it is desirable that there should be an independent tribunal before which a private prosecutor may bring charges against persons protected by the government. This might be a point of great importance in times less peaceable and well ordered than our own.

When a grand jury returns a bill as not found, the accused is not acquitted. Further evidence being discovered may be laid before the same or a future grand jury; and if, then, a bill is found, the accused may be placed upon his trial. A person tried and acquitted cannot be again tried on the same charge. Nemo debet bis vexari pro eâdem causâ.

A coroner's inquest, enquiring the cause of a man's death, is a grand jury. If they find a person guilty of murder or manslaughter, the charge written and signed by them, or a majority of them, the majority consisting of twelve at least, is called a coroner's inquisition. To this the person charged may, at the assizes, to which the inquisition is transmitted by the coroner, be required to plead guilty, or not guilty: and if he pleads not guilty, he may be tried as upon an ordinary indictment.

Between the two sorts of grand inquest, there is a difference of a very peculiar nature. Grand jurymen sit in private, and are sworn to secrecy. Their oath, rather a fine piece of composition, which you have listened to at the assizes, is, as respects this country, a singular instance of enforced secrecy in the transaction of judicial business. The jurymen sworn by a coroner usually sit in public, though the coroner may, if he thinks it conducive to the ends of justice, direct other persons to withdraw, the object being of course to avoid putting suspected persons and their friends on their guard against further investigation.

In like manner justices of the peace, investigating charges which may end in the accused being committed for trial, may, if they think fit, clear the court. This seldom happens. Upon all occasions of magistrates acting judicially, when holding petty sessions for instance, it is a peremptory part of the law that they must, like any other court of justice, sit in public. Publicity is in this country regarded as essential to the due administration of justice; but this obviously does not apply to preliminary investigation, in which secrecy may be of the first importance, lest detection should be evaded or criminals should escape.

LECTURE XLI.

1. *Trial without Jury.*
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7. *Lord Tenterden.*
8. *Lord Denman.*
9. *Lord Abinger.*
10. *Sir William Scott.*
11. *County Courts.*
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13. *Juries.*
14. *Evidence of interested Parties.*
15. *Judicial impatience.*
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For the reason given in my last lecture I shall in the present lecture repeat the substance of a paper written by me and printed in the Law Magazine of 1855, the subjects of it being trial without jury, and the judicial character.

The enactment in the Common Law Procedure Act of 1854, enabling the judges of the superior courts of common law to try, with the consent of the parties, questions of fact without jury, gives rise to many reflections.

The judges may find it an easier duty to try causes unembarrassed by juries; but they will, I think, feel it to be a nobler function with which they may now find themselves invested, that of forming and giving expression to their own judgments instead of acting as the assistants of other men. Trying a cause with a jury, their duty is to state, as clearly as may be, the questions to be decided, and to direct and assist, by what is called a careful summing up, twelve men, whose minds may be already possessed by prejudice, or puzzled by the sophistry, or disturbed by the clamour, or led astray by the eloquence of opposing counsel. Some judges, also, with more or less skill and success, and more or less consistently with their duty, have had the habit of making attempts to lead juries to right verdicts, or to what they have deemed right verdicts.

There were persons who thought that occasionally the summings up of Lord Abinger had too much the character of pleadings in favour of the side which he considered entitled to the verdict. In the former part of his life at the bar, he had a certain way of his own of telling the jury what their verdict ought to be, so as to leave them scarcely the power of deliberation. This command over juries was more appropriate to the bench, and was frequently, in the case of Lord Abinger, irresistible. I remember a trial at which he presided at Stafford, in which, in the course of his summing up, he explained and illustrated the paradox: the greater the truth, the greater the libel. He put the case of a woman who, having erred in her youth, had afterwards, when residing in another part of the country, married a respectable man, and had become the mother of a family; and he supposed a person, knowing the events of the earlier part of her life, to disclose them for the purpose of annoying her husband, or herself, or her family. The way in which he put the case I cannot attempt to relate. In his quiet tone, Lord Abinger asked, if in such a case the saying would not be true: the greater the truth, the greater the libel. He told them to ask their own hearts for an answer. I well remember the answer my own feelings gave; and I could plainly perceive the effect of the question on the minds of the jury; and I now refer to it, not for the purpose of illustrating a paradox, but for the purpose of drawing attention to the sort of power one of the most successful of modern pleaders, carrying his skill to the bench, exercised over the minds of others.

Lord Ellenborough commanded juries by look and tone. His personal dignity was in itself a power and a strength; but it did not always prevail. The London juries came latterly to resist his charges, as too dictatorial. There have been other instances of the jealousy of juries of habitual attempts by judges to lead them or command them.

Lord Tenterden was more successful, by reason of his lucid statement of the facts, and of the law applicable to

them. He seemed to travel with the jury along the right path to justice.

Lord Denman was a striking instance of the power which one man can exercise over other men, when he combines in his one person the scholar, the lawyer, the magistrate, the gentleman. Without art, certainly without the appearance of art, he won the confidence of juries.

We sometimes hear praised the careful summing up of a painstaking judge. But how often is a summing up too minutely careful, setting the facts and combinations of the facts in every possible light, going over them again and again, and distinguishing slight shades from still slighter shades, until every juryman and every listener is in a state of bewilderment, from which it is hopeless that the jury can recover, with their faculties in a state fit for deliberation. When I was a young man, I several times heard one of our most learned judges sum up, in this manner, circumstantial evidence; and some of his successors have had the same fault. Unfortunately, too, this fault, or weakness, or want of skill, is more frequently shown in the most important trials, those of which the result affects the life of the accused—trials for murder. The importance of the trial very properly makes the judge as careful as it is in his power to be; but it unfortunately happens that the more care a judge of this character takes, the more inefficient he becomes.

But I have wandered from the subject I propose to consider: the power to try civil causes in the superior courts without juries; and I have been discussing the characteristics of certain judges as evinced chiefly in the trial of criminal causes.

I return then to our subject. Unfortunately it is not yet become the practice of parties to consent to dispense with juries. I will try to account for this. When there is a difference between two parties, one may be in the right, and the other in the wrong; but it often happens that both are in the wrong, one being more wrong than the other. The

one in the right, or least in the wrong, needs a remedy. He is the most likely of the two to go to law, and he is the most likely to desire that sort of trial which is the most likely to bring the truth to light. He would most likely prefer the judgment of a single judge, a lawyer accustomed to sift and weigh evidence, to the verdict of twelve men taken by lot from the very miscellaneous classes of persons of whose names the jury lists consist. On the contrary, the party in the wrong, or least in the right, is interested in withholding a remedy. He is not the one to commence proceedings; and if proceedings are taken against him, he would most likely prefer the chance of a verdict of a jury in his favour, to the probability of the judgment of a single judge against him. He is not likely to give his consent to a trial without a jury.

What has happened in the county courts may serve to illustrate what I mean. In the case of a difference not within the ordinary jurisdiction of the county courts,—for instance, a dispute involving a question as to the title to land,—the parties in difference may, by consent, give a county court jurisdiction between them, and thus avoid the delay and expense of a trial at the assizes. Consents of this sort are very rarely given, and inquiries have been made as to the cause of this. Some have suggested the reason to be the interest which the lawyers, by whom the parties in difference are advised, have in preferring the more expensive remedy; but I have formed an opinion that the true cause is the natural disinclination of a wrongdoer to facilitate a remedy for the wrong he has inflicted, and his natural disinclination to do that which may lead to his being compelled to make restitution. He cannot be expected to consent to a cheap remedy. He is more likely to hope that his opponent will, for want of means, be unable to proceed to trial at the assizes, involving, among other great expenses, the maintenance of witnesses for days at an assize town. Universal experience tells us that the game of the wrongdoer is, by delay and increase of expense, to

wear out the means and hopes of the person whom he has wronged.

I am inclined to think the better way would be to permit any sort of action to be brought in a county court at the option of the plaintiff, giving the defendant an equal option to remove into a superior court any cause involving a question not now within the ordinary jurisdiction of the county court. A person who would refuse an express consent to an action being brought against him, might, nevertheless, not care to take the trouble and incur the expense of removing it when actually brought. Here, again, what I mean is illustrated by what has happened in the county courts. In any of those courts any cause is, as a matter of course, tried by the judge without a jury, unless in some cases either party requires a jury. It is very rarely that a jury is required. Things take their course. So I think it would be better in the superior courts if, instead of the dispensing with a jury being made dependent on the concurrence of two parties already in difference, the recourse to a jury were made dependent on its being expressly required by one of them.

Nevertheless, upon the probable supposition that there will be in time more and more trials in the superior courts of common law without juries, I shall discuss the new functions with which the judges are thus invested. Henceforth, instead of having, in all trials of questions of fact, to perform the embarrassing duty of assisting others to do what they could do better alone, they will sometimes find themselves in a position in which their function will be to listen carefully to the evidence, to sift, and compare, and weigh it calmly, to form their impartial conclusions, and to express them clearly, satisfying their own consciences, instead of endeavouring, often vainly, to give a right direction to the consciences of twelve other persons, and making attempts to lead them to a right conclusion.

I will now consider, as forming, it will be seen, a part of our present subject, some of the means of detecting truth

when hidden in a mass of conflicting evidence. This is more likely to be effected, now that the interested parties may be heard, than when their evidence was rejected. In this reference to the evidence of interested parties I am anticipating the important subject of a future lecture: the statute having the effect of repealing, for most purposes, the maxim which had always been a very peremptory part of the law of England: Nemo debet esse testis in propriâ causâ. As will be explained in the lecture on this subject, those who really know the truth, are now permitted, or if they hold back, may be required, and even compelled to give evidence. In a trial of a question of fact the truth may generally be said to be present in court, known to one or more persons who conceal it: the object is to bring it to light. Of the various tests of truth, with which the experience of lawyers has made them long familiar, I do not propose to speak. I intend to confine my remarks to those tests only which have become useful by reason of the evidence of interested parties being made admissible.

It sometimes happens that when two persons, both interested, and both from their character or from circumstances equally unworthy of credit, contradict each other in their evidence, the truth, or the probable truth, may be elicited from their statements, by the process of comparing admissions inadvertently made by one against his interest with admissions inadvertently made by the other against his interest. Sometimes, too, admissions against apparent interest are not inadvertent, and are mixed up with false statements for the purpose of giving them a show of candour or a tinge of honesty. Admissions often supply a clue which may lead to the discovery of the truth, and they are sometimes elicited from a party by effective cross-examination, or by a concluding examination by the judge himself, acting on materials elicited by the counsel in their examination of the parties or witnesses.

Points of this sort have always been of especial importance

in the county courts, in which, from their first establishment, the parties interested have been examined as witnesses. They became more important, because available in a more important judicial sphere, from the time a change of the law rendered the evidence of interested parties admissible in the superior courts.

In the county courts, too, these points were, from the first, of great importance, because questions of fact have always in those courts been generally decided by the judges, the parties seldom having recourse to juries. A judge who can, with sufficient skill, collate admissions made by interested parties, each against himself, so as to arrive at the truth, or probable truth, might find it difficult to suggest, much more to explain, to a jury such a course of reasoning, and impossible to direct them or even give them effectual assistance in the application of it to the questions under investigation. As it may be thought that some of the judges of the county courts have derived from their past experience, so it may be considered certain that the judges of the superior courts will derive from their future experience, powers of analysing evidence, the greater from their minds not being disturbed in the application of the appropriate tests, by the necessity of finding words by means of which to express to juries the difficult points to be considered. It may be hoped that some of our judges may now have an opportunity of becoming, in the history of their profession, the rivals of Sir William Scott, the great master of the art of discovering truth through the veil of falsehood.

If, instead of teaching young men, I were now presuming to address the learned persons for whom I am contemplating a new sphere of utility and fame, I would suggest the necessity for curbing any feelings of impatience, leading to too early an expression of the effect which is being made by evidence on the mind. From this fault juries have been usually free, by reason of their habitually passive demeanour.

It is a fault to which an active-minded judge may be found very liable, unless he is most careful to avoid it. The more immediate bad effect of impatience or hastiness on the part of a judge may be that, at an early part of the trial, parties or witnesses may be exposed to censure, which further investigation or reflection may show them not to deserve. The more real bad effect is the embarrassment produced on the mind of the judge himself, if, before having heard all the evidence, he makes known the impression made on him by a part of it. A judge who too soon makes known what is passing in his mind, may not only raise on the one side hopes, and on the other side fears, either of which may needlessly embarrass the party subject to them in the conduct of the cause, but may impose on himself the embarrassing necessity, firstly, of rectifying expressed opinions, and, secondly, of finding terms by means of which fitly to express the change which his opinions undergo. It is an undignified position for a judge to find himself obliged to unsay what he has spoken from the bench, and injurious to his reputation to be often obliged to do so; but, moreover, the thing itself is so difficult to do well as materially to impair the efficiency of a judge in the particular cause in which it becomes necessary. The process is hardly consistent with the calmness necessary for the right conduct of a judicial inquiry.

The last act of the trial, the delivery of the judgment, when all the proofs and arguments have been heard and considered, is, generally speaking, the earliest period at which a judge can safely give utterance to his opinions or his feelings, and then, so far as is right for the purpose of making known the grounds of his judgment, his place is plainly and fearlessly to declare his opinions and his feelings. I do not say that exceptions will not occur to the rule I am insisting on, that a judge must carefully guard himself against every disposition to impatience. Roguish claims are sometimes made, and roguish defences are some-

times attempted, which cannot be expected to receive from a man of right feeling any other regard than that of scorn, or any other treatment than that of being summarily crushed. Cases of this sort happen from time to time, but they are comparatively of rare occurrence, and the safest course for a judge is to be slow to perceive them. It is a fatal error to be too ready to stop causes. Injustice, or the sense of injustice, thus caused, may be irreparable. On the other hand, a cause stopped on safe grounds is an excellent precedent, deterring other suitors from attempts to practise imposition on courts of justice.

It will be perceived that I anticipate great advantages to the judicial character from the practice, if it should ever fortunately prevail, of dispensing with juries. I am also sanguine enough to hope for still greater advantages to the character of the English advocate. Sophistry, passion apart from reason, rhetoric without logic, will no longer be effective weapons. Fluency, verbiage, iteration will be valueless. Clamour, and abuse of parties and witnesses, and personal display, will not serve as substitutes for argument. Those men who, now at the bar, adorn their profession by their real eloquence, their skill in argument, by their appeals to the feelings, when the feelings are fairly interested, by language deriving real strength from its gravity and moderation, will meet with more ample rewards and honours, and will find many imitators. Then will be felt the truth of the principle, too often unheeded, that the advocate is properly the assistant of the judge, bound to say all that he can fairly say for the party for whom he is retained, but not justified in attempting to mislead the court or jury by the distortion of facts, or by any artifice inconsistent with a regard for truth. Those persons who, in the struggle for success, have hitherto sometimes more or less habitually yielded to the temptation to say that for their clients which a man would not, consistently with honesty, say for himself, will, when addressing a single

judge trying questions of fact, find that such practices must be given up as unavailing in each particular case, and as destructive of the character of the advocates who have recourse to them. I feel assured, not without some experience to warrant the assertion, that an advocate properly qualified for his office will find his services useful to his clients, in proportion to the candour with which, urging all that may be fairly urged, he abstains from addressing to the court arguments tainted with falsehold. It is no fanciful contrast to draw, that on the one side of the high-minded pleader of causes, the advocate, in the true sense of the word, who, scorning unworthy artifice, renders good service in the administration of justice; and, on the other side, of the hireling, who, with no other object than that of obtaining verdicts, whether rightly or wrongly, habitually distorts the facts, and is an unworthy disturber of what, but for him, might be the pure stream of justice. I believe that the first class is, in these times, becoming more numerous, the latter class more rare. I firmly believe that the more frequent trials of questions of fact by experienced judges, instead of inexperienced jurymen, become, the sooner will the class of unworthy hirelings vanish from our tribunals, and the sooner shall we see realized the theory, that the advocate is an assistant judge. Need I dilate on the consequent advantages to the judge, to the litigants, and to the community?

I have reason to believe that the suitors are better satisfied if a judge, deciding questions of fact, states the grounds of his decision, than if he pronounces a bare "judgment for the plaintiff," or "judgment for the defendant," like the verdict of a jury, for the plaintiff, or for the defendant. But I should not have adverted to this point, were it not that I have still greater reason for believing that the losing party likes to know why he loses, and is pleased if he can gather from the judgment, that all facts and arguments, making apparently in his favour, have received due consideration.

But this, and similar points, occupy doubtless the thoughts of those who may have now cast on them a new class of duties. To the discharge of those duties they will bring those qualities which make them worthy of their high position, rendered still higher and more useful by their becoming now, more than ever, the real arbiters of questions and disputes arising among the inhabitants of this great country.

LECTURE XLII.

1. *Common Law changed by Act of Parliament.*
2. *Maxim: Nemo debet esse testis in propriâ causâ.*
3. *Maxim abrogated.*
4. *Real interest.*
5. *Fancied interest.*
6. *Nominal interest.*
7. *Trustees.*
8. *Heir.*
9. *Absence of Witnesses.*
10. *Mischiefs and Absurdities of Rule.*
11. *Witness. Disqualification. Crime.*
12. *Lord Denman's Act.*
13. *Parties. Witnesses.*
14. *Husbands and Wives.*
15. *County Courts.*
16. *Criminal Proceedings.*
17. *Acts of Parliament. Blunders.*
18. *History of Act in its Passage through Parliament inadmissible to show intention.*
19. *Actual intention.*
20. *Expressio unius est exclusio alterius.*

THERE are few subjects more worthy of the attention of a law student than that which I make my chief instance of the manner in which modern legislation has changed the common law. It is, the repeal, except in criminal proceedings, and except in a very few civil proceedings, of the maxim: *Nemo debet esse testis in propriâ causâ.* Until recently, this maxim was a most peremptory part of our law. Its direct effect was to exclude the evidence of the parties to every litigation, and that of their wives and husbands, and also the evidence of persons for whose benefit or protection any action was brought or defended; but it also excluded not merely the evidence of persons who were contending for valuable rights, or who had a direct pecuniary interest in any litigated question, but also the evidence of persons having what could scarcely be designated as other than fancied interests.

The evidence of a person who was interested only as a trustee was thus excluded. If you look at treatises on

evidence, you will be surprised at the slight and fanciful grounds upon which the evidence of persons was rejected upon the supposition of interest.

All lawyers, except the very young, may remember the waste of time and money spent in disputing, in courts of justice, the propriety or otherwise of admitting or rejecting the evidence of persons whose interest, if it could be made out, was only nominal. The absurdity of an interest only nominal being treated as a real interest was disregarded; and on the ground of it the evidence of a mere trustee might be rejected, while in the same cause the evidence of the eldest son and heir apparent of the claimant of a large property might be received, the law not taking notice of his interest in the success of his father, because his prospect of the inheritance was not a direct interest, but depended only on a possibility of his surviving his father and becoming his heir, and of his father not disinheriting him.

There were other cases in which this rule of law rejected, on the ground of interest, the evidence of persons having no interest that could be supposed to influence them, and admitted the evidence of persons whose real interest in the matter in dispute was manifest though not recognized by the law.

Moreover, it often happens that a business transaction takes place between two persons without the presence or intervention of any witness, whether agent or servant or friend. If in a case of this sort disputes ensued, the party injured might be, while the law remained unchanged, without a legal remedy by reason of the maxim: *Nemo debet esse testis in propriâ causâ.* In such a case, the only or best mode of ascertaining the truth was rejected.

Again, there were cases in which the truth being known to the parties only, their evidence was rejected, and the courts were compelled to attempt to collect it from circumstances, detailed by persons imperfectly acquainted with the facts. Some one remarked, that the law chose to grope about in the dark, taking the chance of finding or missing

the truth, for fear of being deceived by those to whom alone the truth was known.

I have mentioned only a few of the mischiefs and absurdities consequent on the strictness of the rule rejecting interested witnesses. The fine distinctions, involved in the discussion and application of the rule, were the delight of lawyers whose memories were stored with the names of cases in the reports of which these distinctions were to be found.

For many years these mischiefs and absurdities were repeatedly and sufficiently exposed in the writings of Bentham, and of others, who, with the character of lawyers blended that of philosophic reasoners. At length a partial remedy was provided by an act of parliament made in the year 1843 (*a*), and called Lord Denman's Act.

That you may understand the full import of the enactment then made, you must be informed that up to that time certain crimes made the evidence of those convicted of them inadmissible, even in cases in which they were not interested. Phillipps, in his work on Evidence, writing long before this statute was made, says (*b*), "it frequently "happens that a witness is suffered to give evidence, "because not absolutely disqualified by the rule of law, "though he may be far lower in point of credit and real "character than another, who is excluded as incompe-"tent."

Questioning the propriety of the rule which excluded the evidence of a convicted criminal, Phillipps remarks (*c*), "although the moral principle of a witness on some former "occasion has proved too weak to resist a passion or temp-"tation of interest, it does not follow that he ought to be "accounted wholly undeserving of credit, when there may "be no temptation to lead astray, or where it may be "reasonably supposed that the oath he takes, and the fear

(*a*) 6 & 7 Victoria, chapter 85.
(*b*) Phillipps on Evidence, I. 14.
(*c*) *Ibid.* I. 15.

" of the temporal punishment annexed to perjury will not " be without influence in causing him to adhere to truth." Again, he says (*a*), " the distinction between offences for " which a conviction disqualifies a witness is often purely " technical, the whole class of offences which come under " the denomination of felony, incapacitate: although in " many misdemeanors there may be much more depravity " than in some kinds of felony."

The crimes, convictions of which rendered the criminals too infamous to be admitted as witnesses, are enumerated in the chapter of Phillipps on Evidence, from which I have just been quoting. Among them are treason and every sort of felony. He proceeds thus (*b*): " it has been " generally laid down by writers on the law of evidence, " that every species of the *crimen falsi* renders the party " convicted an incompetent witness. The term *crimen* " *falsi* is one which has been taken from the Roman law, " and the precise extent of the signification which it has " received in our law appears to be involved in some degree " of uncertainty." Again, he says (*c*), " it does not appear " that every offence which involves the charge of falsehood " or fraud will render a witness incompetent." Some of the instances this writer gives of crimes of this nature, excluding the evidence of persons convicted of them, are forgery, perjury and conspiracy to accuse another of a capital offence.

We will now return to the statute, my inspection of which has led me into a digression on the subject of incompetency to be a witness by reason of crime. The preamble of the statute is in these words: " Whereas the " enquiry after truth in courts of justice is often obstructed " by incapacities created by the present law, and it is " desirable that full information as to the facts in issue, " both in criminal and in civil cases, should be laid before

(*a*) Phillipps on Evidence, I. 16.
(*b*) *Ibid.* I. 17.
(*c*) *Ibid.*

" the persons who are appointed to decide upon them, and " that such persons should exercise their judgment on the " credit of the witnesses adduced, and on the truth of their " testimony."

The first section contains, in a multitude of words proper to make it effectual, an enactment that no person offered as a witness shall be excluded by reason of crime or interest. It contains a proviso to the effect that the act shall not render competent witnesses the parties real or nominal to any litigation, or their husbands or wives.

The law being thus simplified, hundreds of reported decisions and hundreds of pages of law text-books may now be disregarded by the student, and are never thought of by the practitioner.

The act of parliament made in 1846 (*a*), establishing the modern county courts, renders parties in litigation in those courts, and their wives, competent and compellable to be witnesses.

In a great majority of trials in the county courts, the parties are examined; and in a great many, they are the only witnesses. It sometimes happens that a party requires his adversary to give evidence. Whether the enactment just referred to was or was not originally intended as an experiment, its working was watched by lawyers and legislators, and appropriate enquiries were made of the county court judges; and it was at length regarded as a successful experiment. My impression is, that the enactment has been especially efficient in enabling parties to compel from their adversaries admissions of the truth which could not otherwise have been obtained.

However this may be, a statute passed in 1851 (*b*), contains in its 2nd section an enactment to the effect that parties in litigation shall be competent and compellable to give evidence.

The 3rd section provides, that nothing contained in the

(*a*) 9 & 10 Victoria, chapter 95.
(*b*) 14 & 15 Victoria, chapter 99.

act shall render a person, who in any criminal proceeding is charged with an offence, competent or compellable to give evidence, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife for or against her husband.

The 4th section provides, that nothing contained in the act shall apply to any action, suit or proceeding instituted in consequence of adultery, or to any action for breach of promise of marriage.

Looking at the statute, you will perceive that the second section does not make the evidence of wives or husbands of parties admissible. But for the known history of this statute, it would be difficult to suppose that this omission was intended. The omission would seem to be one of those blunders often met with in acts of parliament: otherwise the mention, in the third section, of husbands and wives would look like a blunder of that sort. These mistakes usually happen by reason of a clause being altered in the passage of a bill through parliament without heed to other clauses or sentences in which alterations should also be made to make the whole act consistent. In time, you will be surprised at the many instances of blunders of this sort to be met with in the books of reports, giving rise to an infinity of puzzling questions. One of these instances is, the discussion in courts of justice of the effect of the very statute last referred to.

Soon after the passing of the statute, a question arose in the Court of Exchequer (*a*), and afterwards in the Court of Queen's Bench (*b*), whether the statute did not by implication make admissible the evidence of the wife of a party to a suit. Both courts decided that the statute had not that effect. From this opinion, Mr. Justice Erle dissented,

(*a*) *Barbat* v. *Allen*, 21 Law Journal, New Series, Exchequer, 155, 1852.

(*b*) *Stapleton* v. *Croft*, 21 Law Journal, New Series, Queen's Bench, 247, 1852.

on the ground that "the law relating to the exclusion of "evidence on account of interest gave effect to *the principle "of uniting the interest* of husband and wife. If the "husband was excluded on account of interest, so also was "the wife on account of her united interest; and if the "capacity of the husband was restored, the wife became "thereby also capable."

Founding his opinion against the competence of wives on the ground of their not being mentioned in the second section, Mr. Baron Parke said, "the only colourable "argument in favour of the defendant" (the defendant's wife had been tendered as a witness on his side and rejected) "is that founded on the language of the subsequent "section, in which it is provided, perhaps unnecessarily, "that nothing in the act contained shall render the husband "or wife competent or compellable to give evidence for or "against each other in criminal proceedings. It is said, "that from these negative words we may imply the affirma-"tive proposition, that they are to be competent in other "cases, I think we ought to make no such implication. "The third section is not so fully worded as it might have "been, and perhaps only mentioned criminal proceedings as "those in which husband and wife were most likely to be "offered as evidence against each other, leaving the law in "all other cases as it stood under the former section."

Chief Baron Pollock, by whom the evidence of the defendant's wife had been rejected, said: "the third section "of the recent act is not open to the explanation suggested "by my brother Parke; for Lord Truro, in one of his "public judgments explains exactly how it came to be so "framed: while, however, I allude to that, I must at the "same time say that the history of a clause in a statute, "attested by the personal knowledge of members of the "legislature, is certainly no ground of decision in a court "of law; and I think it right to guard myself against the "supposition that we could resort to such means to find "out the meaning of a statute. Lord Truro stated, that

" when the bill was before the House of Lords, he moved " that the clause (words) which gave the courts of law the " power of examining the wife be struck out: and it was " struck out accordingly. In the body of the bill, however, " and in another clause, there was a provision against (*a*) " the reception of the evidence of the wife in certain cases, " and in the trial of criminal offences. That clause, by an " oversight, and in consequence of the late hour at which " the bill was discussed, had been permitted to remain; " and one of the judges, seeing that the evidence was re- " ceivable in certain specified cases (*b*), assumed that it " was receivable in all, although the general clause had " been struck out. It must be admitted that a *scintilla* " of argument for the defendant may be founded on the " construction of the language of this third section, thus " inserted *ex majori cautelâ.* But the first section goes " the other way: and I think that the inference from that " section is stronger than the somewhat feeble inference " deducible from the third; and, consequently, that the " wife of the defendant in this case was inadmissible as a " witness."

Lord Campbell said: " My opinion is, that it would be " an improvement in the mode of administering justice to " admit husbands and wives under certain restrictions. " They ought not to be admissible in criminal cases; and " no communication which has passed between them con- " fidentially ought to be disclosed by them. But, with " these exceptions, I think the administration of justice " would be furthered by admitting their evidence for or " against each other. However, I can only look to the " law as it exists, and to what the recent statute enacts. " We cannot look to the history of the statute, or to the " private intention of the framer of it, or to any mistake

(*a*) In the Law Journal, the words "power given for" should evidently be "provision against." I have corrected this in my extract.

(*b*) What "specified cases?"

" which is suggested to have occurred in the passage of the " bill through parliament. We must look to its words."

Differing from Mr. Justice Erle, Lord Campbell says: " One reason given for the exclusion of the wife of a party " is to preserve the peace of families; and *it is not rested* " *merely on the ground of interest.* Lord Coke, Lord " Hardwicke and other most eminent judges and text " writers have so laid it down; and it has been said, that if " this practice were permitted, implacable enmity might be " produced between husband and wife."

Again, Lord Campbell says: " The wife is not a party to " the suit in which her husband is plaintiff or defendant, " although they are, in the contemplation of law, one " person. It might as well be said, that under a judgment " in an action against a husband separately, the wife could " be taken in execution, because husband and wife are one " person in law. It seems to me, therefore, that under sec- " tion two the wife remains incompetent as before. Stress " is then laid on section three. If it were a doubtful question " under section two, section three might afford a fair argu- " ment on the ground that *expressio unius est exclusio alte-* " *rius.* But I must say that, after deliberately considering " the matter, I think it was the express intention of the " legislature to exclude wives in civil cases. If that be so, " section three will not assist; and the wife still remains in- " competent, as at common law. Such is the opinion ex- " pressed by Lord Truro and the Court of Exchequer."

Notwithstanding my having brought together in this lecture these long extracts, I recommend you to read the whole of these two cases of *Barbat* v. *Allen* and *Stapleton* v. *Croft.* I regard them as fair specimens of discussions on the effect of statutes, the construction of which is made difficult by blunders contained in them. In this point of view you will find them instructive reading.

As respects husbands, that the act left their evidence inadmissible in cases in which their wives were parties was but of little importance, inasmuch as, except in a few pos-

sible, but rare, cases, the husband of a married woman is always made a party in every action in which she is made a party. In every such case of a husband being a party to an action, the statute makes his evidence admissible as that of a party.

As respects wives, the statute was, in practice, found inconveniently defective. Accordingly, in conformity with the opinion expressed by Lord Campbell, an act of parliament was made in 1853 (*a*), by the effect of the first and fourth sections, of which, the husbands and wives of litigating parties, whether interested or nominal parties, are now competent and compellable to give evidence. The second section provides that nothing in the act shall render any husband competent or compellable to give evidence for or against his wife, or any wife for or against her husband, in any criminal proceeding, or any proceeding instituted in consequence of adultery. The third section is obviously intended to prevent the law infringing on the confidence which should exist between husband and wife. It is in these words: "No husband shall be compellable to dis- "close any communication made to him by his wife during "the marriage: and no wife shall be compellable to dis- "close any communication made to her by her husband "during the marriage."

I trust that you are now made familiar with the almost entire change made by the statute law in respect of the common law rules for the exclusion of the evidence of interested persons.

(*a*) 16 & 17 Victoria, chapter 83.

LECTURE XLIII.

1. *Libel.*
2. *Slander.*
3. *Differences.*
4. *Slanderous Words.*
5. *Crime.*
6. *Infection.*
7. *Trade.*
8. *Livelihood.*
9. *Office.*
10. *Actual Damage.*
11. *Abuse.*
12. *Blackleg.*
13. *Cheating at Cards or other Games.*
14. *Smashers.*
15. *Words. Meaning.*
16. *Technical Words.*
17. *Slang.*
18. *Cuilibet in suâ arte credendum.*
19. *Opinion. Evidence.*
20. *Experts.*
21. *Medical Jurisprudence.*
22. *Foreign Law.*
23. *Scotch Law.*

As one of the chief instances of parts of the common law changed by acts of parliament I have selected the law of libel.

To present properly this subject to your minds, it is convenient to speak in the first place of the distinction between slander and libel. According to the technical meanings of those terms I thus define them. Injurious words spoken only, not written or printed, are slander. Defamatory words, written or printed, are a libel. Slander and libel are the two species into which is divided one genus of injuries consisting of injurious words.

For slander an action is maintainable by the person injured. For a libel an action may also be maintained by the person libelled; or the publisher of the libel may be indicted and punished as a criminal.

I desire your close attention to the differences between slander and libel which I intend to place before you, and by means of which I mean to exemplify my favorite way of teaching; that of dwelling on points of difference between two similar things, and so conveying clearly to the mind the details of both.

Slanderous words, for which the law provides a remedy, are of two classes; the first consisting of plainly injurious words for which an action may be maintained, whether they do or do not cause actual damage; the second consisting of words which, though not plainly injurious, are disparaging, and are intended to cause, and actually do cause, damage. For words comprised in the first class an action lies, even when the injury does not cause mischief: injuria sine damno. To bring words within the second class there must be both injury and damage: injuria et damnum; the injury resulting from the wrongful intention, the damage being the actual result.

The first of the two classes into which I have thus divided slander is thus well described by Stephen, in his Commentaries: "When a man utters any thing of another "which may either endanger him in law by impeaching "him of some punishable crime,—as to say that he hath "poisoned another, or is perjured; or which may exclude "him from society,—as to charge him with having an "infectious disorder, tending so to exclude him; or which "may impair or hurt his trade or livelihood,—as to call a "tradesman a bankrupt, a physician a quack, or a lawyer "a knave; or which may disparage him in an office of "public trust,—as to say of a magistrate, that he is partial "and corrupt."

I shall now speak of the second of the two species into which I divide defamatory words: those in respect of which an action can be maintained when the person speaking them intends to cause, and by using them actually does cause, damage to the person of whom he speaks. Of the many words of this sort I select a few of the most common by way of example; namely, rascal, scoundrel, villain, cheat, swindler. To apply any of these abusive terms to a man does not imply that he has been guilty of a crime for which he may be punished, as does either of the words, traitor, murderer, thief, perjurer.

In the year 1858, the curious question was discussed in

the Court of Exchequer (*a*), whether a person can maintain an action against another who calls him a blackleg without causing him actual damage. The four barons present at the argument were equally divided. Baron Martin and Baron Bramwell thought, that by the word blackleg is meant a person who cheats at cards or other games; and, as a person may be indicted and punished for cheating at cards or any game (*b*), the word imputes an indictable crime, and is, therefore, actionable without actual damage. Chief Baron Pollock and Baron Watson thought that a man might be a blackleg without being a cheat. Indeed, the chief baron gave this amusing and well-expressed definition of the term: "A person who gets his living by frequenting "race-courses and practising games of chance and skill, "constantly betting with the best odds he can obtain in his "favor, giving the least odds he possibly can, doing this "with the view of making money, but not necessarily dis- "honest in so doing or cheating in the sense in which the "word is used in the common law or statute law."

There is one word which I think has so become a part of our language, with a certain meaning, that I think no court of justice could doubt that it imputes an indictable offence; I mean the word smasher, meaning a person whose unlawful trade it is to pass bad money. There are scores of smashers who are well known to the police officers as pursuing that trade. I do not doubt that to be called a smasher is an injury for which a person may sustain an action, without being able to prove that he has sustained actual damage.

When you read the report of the arguments as to the word blackleg, you will perceive that the barons treat the word as having so become a part of the English language as to be susceptible of interpretation by a court without the aid of evidence, two of them thinking that it implied guilt,

(*a*) *Barnet* v. *Allen*, 27 Law Journal, New Series, Exchequer, 412, 1858.

(*b*) Statute 8 & 9 Victoria, chapter 109, section 17, 1845.

and two of them thinking that it had not of necessity that import. They appear to have thought it not to be a word of the meaning of which evidence could be given. This leads me to another important point; namely, that there are in most arts and trades and pursuits technical words, the meanings of which are not generally known, and which courts and juries may be informed of by the evidence of witnesses, engaged in the arts, trades or pursuits, in which the words are used. I must resist the temptation to give instances of this practice. The point is too plain to need illustration by instances, and I must not digress too much from the proper subject of this lecture—the law of slander as introductory to the law of libel. This is, however, not an unfit place to give you some general instruction on a most interesting point, as I now proceed to do.

Often have you and other young men when walking with a farmer over his fields, with a printer or a manufacturer through his workshops, or with a sportsman across the country, or chatting with a seaman on the deck of a ship or in a boat, been gratified by the explanations given you of technical terms, and you have, with the meaning of words, received an increase of substantial knowledge. On such occasions you have the benefit of one of the truths contained in the law maxim: cuilibet in suâ arte perito credendum est. In like manner, judges and juries are constantly told by surgeons and artists, and farmers and land surveyors, and merchants and tradesmen and workmen, and sportsmen and gamekeepers and seamen, and persons of all sorts of professions and trades and pursuits, the meaning of technical words in use.

But I ought not to overlook the language called slang; some words of it, such as smasher, meaning a passer of bad coin, and beak, meaning a justice of the peace, have by frequent use obtained a known meaning, of which any judge or jury may be expected to take notice; but now and then a slang word is used, the meaning and application

of which it is necessary to ask a policeman or some other person likely to be well informed on the point.

But the maxim cuilibet in suâ arte perito credendum est is of still greater value, than as pointing out the right source from which to learn the import and application of technicalities. It is an expression of the rule, that the opinions of skilful persons are often of necessity received by courts and juries to guide them in the discussion and decision of litigated questions. The opinions of farmers as to the management of land, or of sailors, as to the management of a ship, are often of great value; but the instances in which the opinions of professional witnesses are received are innumerable. Witnesses of this sort are in some countries called experts. This word is hardly yet adopted by English lawyers.

Of this class of evidence you are aware the most common is that of surgeons and physicians, whose opinions of the causes of death, or of diseases, and as to the proper or improper treatment of wounded and sick persons, are often indispensable. Questions relating to death, diseases, poisons, medicines, surgery and anatomy, and many kindred topics are so frequent in courts of justice, that a science called medical jurisprudence or forensic medicine is one of the favorite studies of members of the two professions, the medical and the legal, the members of which have thus, as it were, a science common to both. This reminds you of some trials you have been present at, and of many of which you have read reports in the newspapers, especially some celebrated trials for murder.

A very remarkable instance, not merely of the admissibility, but of the necessity, of evidence of the opinion of experts remains to be mentioned. When in a court of justice a question of foreign law arises, the judges do not seek information from books, nor do they make use of any casual knowledge of their own. They must be informed the state of the foreign law by an expert, a lawyer of the

foreign country, sworn like any other witness, and then stating his opinion.

Nay, strange as it may seem to you, if a question of foreign law arises before a jury, the point is treated, not as involving a question of law to be decided by the judge, but as a question of fact on which the jury is to find a verdict.

English lawyers are greatly interested when listening to the evidence of a foreign advocate, or, as more commonly happens, of a Scotch advocate. The law of Scotland, differing, as you know, from ours, is regarded by us as foreign law.

An act of parliament (*a*) passed in 1859, enables any court of justice in any part of the Queen's dominions to ascertain the law, applicable to any state of facts, as administered in any other part of the Queen's dominions, by stating a case for the opinion of a superior court of justice of the country, the law of which it is desired to ascertain. For giving effect to this object the statute contains several clauses. As it only gives a power, which may be exercised or not, it follows that cases may still arise in which in an English court Scotch advocates may be called to prove points of Scotch law.

When I began this lecture I intended it to be a little treatise on the law of libel, illustrated by parts of the law of slander. I find it, in the result, to be a discourse on slander only, with a digression on the import of a maxim of general interest, but also of especial use with reference both to slander and libel. I now think it convenient to make a pause and to reserve the law of libel for my next lecture.

(*a*) 22 & 23 Victoria, chapter 63.

LECTURE XLIV.

1. *Libel.*
2. *Slander.*
3. *Libellus.*
4. *Libellus famosus.*
5. *Definition of Words.*
6. *Defamatory Picture.*
7. *Libel. Treasonable.*
8. *Seditious.*
9. *Blasphemous.*
10. *Libel. Canon Law and Civil Law Courts.*
11. *Ridicule.*
12. *Press. Freedom.*
13. *Libels disregarded.*
14. *Slander. Action.*
15. *Libel. Action.*
16. *Indictments.*
17. *Criminal Information.*
18. *Queen's Bench.*
19. *Misdemeanor.*

In an enumeration in the Institutes (*a*) of injuries for which the Roman law provided remedies, one injury is thus specified: "Si quis ad infamiam alicujus libellum, aut carmen, "aut historiam, scripserit, composuerit, ediderit, dolove "malo fecerit, quo quid eorum fieret." I quote this passage because of the use in it, with reference to defamation, of the word libellus, a little book, the origin of the English technical word libel.

With us a libel may, as explained in my last lecture, be thus defined: defamatory words, written or printed. Whether such words are written or printed in a book, a letter, a newspaper, or in any other form, they are still termed a libel. Our word libel has nearly the same meaning as the Roman law phrase: libellus famosus. The word libellus did not, with the Romans, of itself import an injury. It meant only a little book. If a book had the effect of defaming any one, then it became libellus famosus.

One of the qualities of a definition of the meaning of a word should be to be comprehensive, if possible, of everything which the word designates. With reference to this quality my definition of a libel,—defamatory words, written

(*a*) Institutes, 4, 4, 1.

or printed, is defective; inasmuch as it does not include a defamatory picture which, according to our law, is a libel. Like many definitions, useful for practical purposes, you must be satisfied with my definition, though it may sometimes need explanation with reference to particular points as they arise.

In another aspect also my definition is imperfect. It does not comprise what is called a treasonable libel or a seditious libel, or a blasphemous libel, happening not to defame any person; but the publisher of which may nevertheless be punished as a libeller.

There is, in the courts in which the practice is according to the canon law and the civil law, yet another use of the word libel. In those courts, the Ecclesiastical Courts and the Admiralty Courts, of which I hope to treat in future lectures, the complaint or charge made by the plaintiff in a suit, against the defendant, is called the libel.

Returning to the subject of libel, according to the common law use of the word, I desire your renewed attention to the chief difference, spoken of in my last lecture, between slander and libel. As you were then told slanderous words, for which a person of whom they are spoken may maintain an action, must either impute to him a crime for which he may be punished or tend to exclude him from society, or tend to damage him in his trade or livelihood, or to disparage him in an office of trust, or they must be intended to do him damage and actually have that effect.

The law is very different in respect of a libel. Whether it is that the law treats with greater severity words written or printed, because they are more deliberate than spoken words, or whatever be the reason, the restrictions in respect of slander do not apply to libel. Any defamatory words, written or printed, are a libel, and the law provides a remedy, whether they do or do not impute a crime, or have or have not any of the injurious tendencies just referred to, or whether they are or are not intended to do actual damage,

or whether they have or have not that effect. Any statements, any remarks, any arguments, any insinuations, any epithets, any words of any sort tending to degrade or discredit a man in the opinion of others, or make him contemptible or ridiculous are, if written or printed, a libel in respect of which he may maintain an action or prosecute the libeller as a criminal.

This being the comprehensive state of the law of libel, it may seem strange, considering the freedom with which the motives, and conduct, and characters of men are, now more than ever, brought into public, and discussed, and impugned and ridiculed, that there are comparatively so few actions and prosecutions for libels. This may be accounted for in several ways. In the first place there prevails, especially among public men, a feeling that the advantages of the freedom of the press are so great and so essential, that it is wise to overlook many abuses of it, rather than incur any risk of impairing its utility. In the next place, many a man libelled unjustly, conscious of the rectitude of his intentions, strengthened by the sympathy of his friends, trusting to the impartiality of others, feels that he may overlook the attack without real risk to his reputation, and that he may thus deprive, as far as he can, his defamer of the satisfaction of knowing that his sting has done its work, that of causing annoyance to be remedied only by a recourse to litigation, and its incident evils. In the third place, it is to be hoped that many men are influenced by their religion, of which one of the chief precepts, if not the chief precept, imposes on all, as a duty, the forgiveness of injuries. In the New Testament you find passages which serve to apply the spirit of this precept more directly to those who are injured by calumny.

I have glanced at the next difference between slander and libel. For slander the person injured may maintain an action, but the slanderer cannot be punished as a criminal. For a libel a person injured may maintain an action, or the libeller may be indicted and punished as a

criminal. This difference may be attributed to the forbearance due to the haste with which words may be spoken as compared with the deliberation with which words are written or printed, or to the greater publicity and permanence of a libel, and its greater tendency to provoke a breach of the peace. In few words, slander is regarded only as a private injury; libel, both as a private injury and as a crime.

I must now bring forward a topic for which a more appropriate place might be, a description of the jurisdiction of the Court of Queen's Bench, but which so directly concerns the subject of libel, that it cannot be omitted from this lecture. For a libel, the prosecution may be by indictment. But for this offence, as for any misdemeanor, that is, any crime not being treason or felony, the offender may be prosecuted by means of what is called a criminal information filed in the Court of Queen's Bench. A criminal information cannot be filed, at the instance of any other prosecutor than the Attorney-General, except by leave of the court.

You have often read in the newspapers reports of applications for leave to file criminal informations for libels. This mode of prosecuting a libeller is usually preferred to an indictment. It is also preferred to an action to recover damages. The reason of this preference is, that the judges of the Queen's Bench will never grant leave to file an information, unless the prosecutor expressly denies the truth of the assertions against him. It often happens that an innocent man, libelled, is glad to resort to this means of promptly clearing himself by his own oath, without waiting an indefinite time for an opportunity of vindicating his character at the trial of an indictment or action. The effect is that, in very many cases, leave to file the information being granted, the person to be prosecuted, especially if the publisher of a newspaper, is satisfied by the oath of the prosecutor, withdraws the defamatory imputation and pays the costs; and so the matter ends.

The powers of the judges are so prudently and ably exercised in the disposal of applications for leave to file criminal informations, that the Queen's Bench may with truth be said to have acquired the character of a court of honor. Their intimations as to concessions and apologies, which ought to be offered and accepted, are usually willingly acceded to by the parties interested to the great relief and advantage of both.

LECTURE XLV.

1. *Libel not published.*
2. *Libel. Publication.*
3. *Letter.*
4. *Anonymous Letters.*
5. *Qui facit per alium facit per se.*
6. *Libel.*
7. *Trespass.*
8. *Assault.*
9. *Imprisonment.*
10. *Distress.*
11. *Servant. Negligence.*
12. *Agent. Responsibility.*
13. *Necessity.*
14. *Soldiers. Duty.*
15. *Postman.*
16. *Libel. Privileged Communication.*
17. *Servant. Character.*
18. *Honesty. Good Faith.*
19. *Malice. Bad Faith.*
20. *Advocates.*
21. *Business Letters.*
22. *Literary Criticism.*
23. *Public Men.*
24. *Press. Freedom.*
25. *Abuses.*
26. *Injuria sine damno.*
27. *Damnum absque Injuriâ.*
28. *Resentment.*
29. *Revenge.*

Looking again, at the beginning of the last lecture, at the passage quoted from the Institutes, you will perceive that, according to the Roman law, the guilt in respect of a defamatory book, or poem, or story, consisted in the writing it, the composing it, or the publishing it, or the maliciously causing it to be written, or composed, or published. The English rule on the same point may be thus more simply expressed: the guilt in respect of a libel consists in the publication of it. With us, merely to write and not publish, what would, if published, be defamatory, is not an injury to the person to whom it relates; nor is it a crime for which the writer may be punished. A man may amuse himself by writing strictures on another person, not intending to make them known. Without any fault on his part, they may be seen by other persons, for instance, by an officer of the law making a justifiable search, or by an unjustifiably inquisitive person; or the paper on which they are written may be carelessly lost or inadvertently parted with, or it may be stolen. Again, in the case of a writing with an intention to publish, one effect of our law is to give an

opportunity to the offender to change his mind. In such a case a locus pœnitentiæ is of great value.

It has, however, been decided (*a*) that a person who writes a libel in one county with intent to publish it, and afterwards publishes it in another county, may be indicted in either. This decision, and some arguments used by two of the judges by whom it was delivered, Lord Tenterden and Mr. Justice Holroyd, have been supposed to render it doubtful whether the law is rightly stated when it is said that only to write, without publishing, a libel, is not an offence. But, if the arguments are carefully looked at, it will be seen that the judges still treat publication as the completion of the offence, and though they speak of the writing a libel, intended to be published, and afterwards published, as an indictable offence, they do not so speak of the writing a libel not afterwards published. The publication reflects on the writing a criminal character which, without publication, it would not have.

You of course understand that by the word publication is not, when applied to a libel, merely meant the making it generally public, as when a book is sold or given away or a placard distributed. To publish a libel is to part with the possession of it. To send a libellous letter to a person is to publish it to him; even if he be the person defamed. To give a defamatory writing to a friend is to publish it to him. To read it aloud to others is to publish it, unless, of course, as may well happen, this is done inadvertently without a previous knowledge of its tenor. The instances of publication just mentioned are given by way of example. Your own observation will supply many other examples. It might be enough for me to repeat, that to part with the possession of a libel is a publication of it; but I think it better to illustrate the proposition by citing, from the case I have just referred to, parts of the arguments of the judges.

One of the points which that case serves to establish is,

(*a*) *The King* v. *Sir Francis Burdett*, 4 Barnewall & Alderson, 95.

that to post a letter, even though sealed, containing a libel, is to publish the letter in the county in which the post office is situate; and the person so publishing it may be indicted in that county.

Mr. Justice Best said: "But supposing it to have been "sent by the post, my opinion is, that such a sending of it "amounted to a publication. It is assumed that publi- "cation means a manifestation of the contents. I deny "that such is the meaning of publication. In no part of "the law do I find that it is used in that sense. A man "publishes an award; but he does not read it. Again, he "publishes a will; but he does not manifest its contents to "those to whom he makes the publication; he merely "desires the witnesses to take notice that the paper to "which they affix their different attestations is his will. "So in the case of libel, publication is nothing more than "doing the last act for the accomplishment of the mischief "intended by it. The moment a man delivers a libel from "his hands his control over it is gone; he has shot his "arrow, and it does not depend upon him whether it hits "the mark or not. There is an end of the locus pœni- "tentiæ, his offence is complete, all that depends upon "him is consummated, and from that moment, upon every "principle of common sense, he is liable to be called upon "to answer for his act."

Mr. Justice Holroyd said:—"But whether it was sent "away or parted with by the defendant in Leicestershire, "open or sealed, makes, in my opinion, no difference with "respect to the question, whether it was, in point of law, "published by him in that county or not, so far as to give "the jury of that county jurisdiction over that fact. In "Coke's Reports (*a*) it is laid down that a scandalous libel "may be published traditione, when the libel, or any copy "of it, is delivered over to scandalize the party. So that "the mere delivery over, or parting with the libel with that "intent, is deemed a publishing. It is an uttering of the

(*a*) 5 Coke's Reports, 126 a.

" libel, and that I take to be the sense in which the word " publishing is used in law. Though in common parlance " that word may be confined in its meaning to making the " contents known to the public, yet its meaning is not so " limited in law. The making of it known to an individual " only is, indisputably, in law a publishing."

You readily perceive the good policy of the law in treating as a crime the sending to a person a sealed letter in which he is himself defamed. The tendency is manifest of letters so sent to lead to breaches of the peace. But the injury caused to private feelings by letters of this sort, sometimes anonymous, is often very great.

Moreover, our word publication comprises in its meaning the causing a libel to be published, an offence which, in the passage I have quoted from the civil law, is referred to distinctly from that of publishing it. According to English law, a person by whose direction an injury is done by another, is himself guilty of the injury: qui facit per alium facit per se. Thus a person who causes the publication of a libel publishes it; a person by whose orders or authority a trespass is committed is a trespasser; a person who directs another to assault or imprison a third person is, if obeyed, guilty of the assault or of the false imprisonment. For example, a landlord is responsible for an unlawful distress made by a bailiff acting under his authority; and a person who unlawfully gives a person in charge of a constable is guilty of false imprisonment. This is indeed in conformity with a rule of the Roman law (*a*): is damnum dat qui jubet dare, enlarged on in the doctrine (*b*) " non solum autem is injuriarum tenetur, qui fecit " injuriam, id est, qui percussit: verum ille quoque tenetur, " qui dolo fecit injuriam, vel qui procuravit, ut cui mala " pugno percuteretur."

The maxim, qui facit per alium facit per se, expresses one ground of that part of our law which, as you have read

(*a*) Digest, 50, 169.
(*b*) Institutes, 4, 4, 11.

in a former lecture, makes a master liable for the consequences of his servant's negligence, causing damage to another, provided the negligence occurs in the performance of a servant's duty to his master.

With us a person, who by the authority of another inflicts an injury, for instance, publishes a libel, makes an unlawful distress, assaults or falsely imprisons a person, is as guilty and as responsible for the injury as the person by whose authority he acts. This rule, which must operate as a great check upon wrongdoers, as preventing their having the assistance of servants and agents, is not inconsistent with the qualification expressed in the civil law: is damnum dat, qui jubet dare; ejus vero nulla culpa est, cui parere necesse est. I apprehend that, consistently with our law making servants and others obeying orders liable for their unlawful acts, cases may be supposed in which a necessity to obey might excuse them; such cases are doubtless rare, and it may be difficult to suggest examples of them, I should think that soldiers under arms, in the presence of rioters, would be deemed not responsible for injuries inflicted by them in immediate obedience to the direct orders of their officer. Military duty and the soldier's oath of obedience seems to impose on every soldier, in the position adverted to, an irresistible duty to obey.

However this may be, I find myself unable to suggest a case in which a person knowingly publishing a libel might be entitled to the benefit of the doctrine: ejus vero nulla culpa est, qui parere necesse est; unless, perhaps, that of a postman delivering according to his duty a letter addressed in libellous terms. The case is not imaginary; for I remember an instance of a gentleman being prosecuted for sending by the post a letter so addressed, as to impute to the person to whom it was directed that she was an adulteress. The legal duty of a postman to deliver promptly every letter entrusted to him was, until lately, strengthened by his oath of office, and is now so strengthened by a solemn declaration to the same effect as the former oath.'

But defamatory words may be spoken, or a defamatory writing may be published, under circumstances which prevent either being treated as slanderous or libellous. In every such case the words or writing are said to be a privileged communication.

Of these privileged communications the instances are innumerable. The most familiar of all is that of a person answering, whether verbally or in writing, an enquiry as to the character of a servant, who, having left his service, is seeking another place. In such a case it often happens that the person, of whom the enquiry is made, is not only justified in law, but bound in point of morals to state what he knows or believes, however disparaging it may be, of the servant. Honestly and in good faith performing this duty a person is free from all responsibility for what he says or writes, even though he may be mistaken in the character he gives. But he must act in good faith; and if, in giving a bad character, he is influenced by malice, the privilege is lost, and he is as liable as if he had spoken or written without any enquiry being made of him.

You are not to infer from what I have just said, that to invest a statement with the character of a privileged communication it is necessary that it should be an answer to an enquiry. It may, obviously, often happen that, to prevent mischief, or under the influence of some other good motive, one person may find it his duty to volunteer, in good faith, information or warning to another, affecting, though it may, the character of a third person. In such a case honesty and good faith establish the privilege; bad faith or malice prevents its existence.

Again, it is every day the duty of advocates in courts of justice to comment, most strongly and freely, on the conduct and character of parties and witnesses. This duty gives, for the benefit of their clients, and often for the public good, a privilege which it is often painful to exercise, and which is less frequently abused by the lawyers of the present day than it was by their predecessors.

Business letters have often, of necessity, as you may well suppose, the character of privileged communications. To be safe the writers of them should be careful, when dealing with the characters of others, to scan their own motives and the phrases they use, lest any appearance of malice should destroy their privilege to write freely.

For the public good, fair literary criticism, though books may be so treated as to bring the authors into contempt or ridicule, is greatly privileged. With reference to this subject, the use of the phrase, fair criticism, is important. From unfairness might be inferred malice, by which the privilege might be lost.

Greatly, must be admitted, is another privilege now and then abused: that in the exercise of which comments are made on the conduct and characters of statesmen and other public men. But so essential to the welfare of a free country has the freedom of the press become, that every patriot is content to bear with some of its abuses, lest its real value and efficiency should be impaired. The right to criticise freely and fairly the conduct and characters of the ministers of the Crown, whether chief or subordinate, and of other public men, is now a valuable part of our law, originating not in any legislative enactment, but in usage and custom. It has been asserted and maintained through many difficulties, and is now firmly established. Its continuance can be endangered only by its being permitted to be used unfairly or for private purposes, or under the influence of malice. To deal properly with any real abuses of this sort it is to be trusted that the law will always be found to have sufficient strength, when its protection is invoked.

I must leave you to collect from law books and newspapers instances, which are sure to attract your attention, and which are of frequent occurrence, of privileged communications. I only insist on your bearing in mind that to every privileged communication honesty and good faith are

essential, and that the existence of malice or bad faith is destructive of the privilege.

The law of slander and libel serves well to illustrate the difference of which I have said a great deal in several of my former lectures: the distinction between injuria sine damno, injury or injustice without damage, and damnum absque injuriâ, damage without injury.

A person, without sustaining any damage, is spoken of, or written of, as a thief. He may maintain an action for the slander or the libel: injuria sine damno. A master giving a character says or writes, honestly and in good faith, that he believes that the servant whose character he is asked is a thief. By reason of this being a privileged communication, the servant does not get the place he was seeking. He sustains a real damage; but he has no remedy. This is damnum absque injuriâ.

A witness censured by a counsel may lose his character. The sale of a book fairly criticised may be thereby diminished. In these and many similar cases, for the damage sustained there is no remedy. Each is another instance of damnum absque injuriâ.

In this respect the principles of English law are consistent with the principles declared by moralists and divines. Thus Butler, in his sermons, explains, better than other writers, that mischief caused without injustice is not, and that injustice is, a proper object of resentment, the natural feeling with which men are endowed to lead them to the redress of injuries by lawful means, stopping short of revenge, which is the unlawful excess of resentment. Whenever the law provides a remedy for an injury, it gives a right direction to resentment, and serves to prevent revenge. Whenever it denies a remedy for a damage, not caused injuriously, it enforces on the sufferer the duty of not resenting that which is not a proper object of resentment.

LECTURE XLVI.

1. *Libel. Legislative Changes.*
2. *Libel. Trial. Judge. Function.*
3. *Jury. Function.*
4. *Seditious Libels.*
5. *Seven Bishops.*
6. *Libel Act.*
7. *General Verdict.*
8. *Judge. Opinion.*
9. *Judicial Usage. Common Law.*
10. *Sir Francis Burdett's Case.*
11. *Special Verdict.*
12. *Arrest of Judgment.*
13. *Words. Shall. May.*
14. *Context.*
15. *Libel. Indictment.*
16. *Libel. Action.*
17. *Privileged Communication.*
18. *Malice.*
19. *Comments.*
20. *Motives imputed.*
21. *Literary Criticism.*
22. *Public Men.*
23. *Press. Freedom.*
24. *Newspapers.*
25. *Leading Articles.*
26. *Evidence.*
27. *Proof.*

By presenting to your minds many of the details of the law of slander and libel, I have now prepared you for the details of the legislative changes of the law of libel.

In the trial of a person accused of a crime, the practice is for the judge, in the course of summing up the evidence, to inform the jury of the state of the law with reference to the question before them, and to leave it to the jury to find a general verdict of guilty or not guilty according to the effect of the evidence, and of the law applicable to it, on their own minds. Such was always the practice, except in cases of persons charged with the publication of libels.

Seeing the general terms in which a libel is defined or rather described, the question whether a particular writing is a libel is sometimes difficult to be determined. By reason of the essential difficulty of questions of this sort, hard often for lawyers to discuss, and for laymen to understand, or from a tendency on the part of some judges of bygone times to assume as much power as they could, or in consequence of some unsatisfactory verdicts having been given in cases in which juries may have been influenced by

political feeling, or for some other reason, it so happened that in the course of the eighteenth century, judges had usurped a power which they exercised in the case of persons tried for the publication of libels as for crimes. A practice became usual for the judge presiding at the trial of an indictment for a libel, if he thought the paper, charged to be a libel, had in law that character, to inform the jury to that effect, and to tell them that the only questions for their consideration were, whether the defendant had published it, and whether the words used had the meaning attributed to them in the indictment, and to direct them, if they thought the defendant had published the paper, and that the words used in it had the meaning attributed to them, to return a general verdict of guilty.

This practice, if it could have been confined to trials for libels affecting private individuals, might, by reason of the frequent difficulties of the sort I have referred to, have been tolerated as leading more usually to justice than to injustice. But it prevailed also in trials for alleged seditious libels, prosecutions for which were formerly a favorite mode of checking patriotism. In such cases it was intolerable, as being destructive of one of the essential functions of a jury indifferently chosen, that of standing between the accused and the accuser, however powerful the latter may be. There have been times when governments needed to be thus checked.

At the trial of the seven bishops, the Chief Justice Wright summed up the evidence, and stated his opinion that the petition presented by the bishops to the king was a libel. Another judge, Allibone, expressed the same opinion. Two other judges, Holloway and Powell, declared, on the contrary, their opinions that the petition was not a libel. The general question, guilty or not guilty, was that which the jury decided. Now had the practice of the reign of George the Third prevailed before the revolution, the chief justice, but for the circumstance of two of his colleagues not agreeing with him in opinion, might in

summing up have left to the jury, as the only question to be considered by them, whether the bishops had presented the petition to the king, that being, if proved, a publication, and directing them, as there could be no question of the meaning of the words used in the petition, if they thought the publication proved, to return a verdict of guilty. I am glad to take this illustration from one of the most interesting of historical events. Had the practice I am discussing then prevailed, the chief justice might or might not have been embarrassed by the circumstance of the court being equally divided on the question of libel or no libel. For their conduct during the trial the judges Holloway and Powell were dismissed, the judges being in those times removable at the pleasure of the Crown. That so great a victory of freedom over despotism, as was the acquittal of the seven bishops, might have been lost, if the jury could have been charged, as were afterwards some of their successors in Westminster Hall and Guildhall, serves to make manifest the value of the enactment, the purport of which I shall now state.

In 1792 an act of parliament (*a*), called the Libel Act, was passed to remove doubts "respecting the functions of juries in cases of libel." The preamble recites to the effect that doubts had arisen whether, on the trial of an indictment or information for a libel on a plea of not guilty, it was competent for the jury to give their verdict on the whole matter in issue. The first section enacts to the effect that, in every such trial, the jury may give a general verdict of guilty or not guilty, and shall not be required or directed by the court or judge to find the defendant guilty, merely on the proof of publication by him of the paper charged to be a libel, and of the sense ascribed to it in the indictment or information.

Thus was a judicial usage and custom stopped in the process of forming itself into a part of the common law of the land.

The second section provides to the effect that the court or judge shall, according to their or his discretion, give their

(*a*) Statute 32 George III., chapter 60.

or his opinion and directions to the jury in like manner as in other criminal cases. With reference to this provision it was decided, in the case referred to in my last lecture, that the judge was justified in adding to the expression of his opinion that the letter, for the publication of which the defendant was indicted, was a libel, they were to take the law from him, unless they were satisfied he was wrong. Upon this point some of the remarks of Mr. Justice Bayley are remarkable: "I entirely agree that the learned "judge did right in intimating to the jury his opinion on "the question, whether this was or was not a libel, and in "telling them that they were to take the law from him, "unless they were satisfied he was wrong. The old rule of "law is: ad quæstionem juris respondent judices, ad "quæstionem facti respondent juratores; and I take it to "be the bounden duty of the judge to lay down the law, "as it strikes him, and that of the jury to accede to it, "unless they have superior knowledge on the subject; and "the direction in this case did not take away from the jury "the power of acting on their own judgment." I wish you to peruse the whole of the report of this celebrated case of The King against Sir Francis Burdett (*a*). On various topics it contains most interesting and instructive reading. The decision of it was one of the important events of the year 1820, a period of great political strife.

The third section provides to the effect that nothing in the act contained shall prevent the jury from finding a special verdict as in other criminal cases. With reference to a criminal case, a special verdict, as distinguished from a general verdict of guilty or not guilty, may be thus defined: a verdict stating the facts as the jury find them to be proved, and submitting to the judgment of the court whether they constitute the crime charged in the indictment; whether murder, or manslaughter, or larceny, or libel, or any other crime.

(*a*) *The King* v. *Burdett*, 3 Barnewall & Alderson, 717; 4 Barnewall & Alderson, 95, 314.

The fourth section provides to the effect that, in the case of a verdict of guilty, it shall be lawful for the defendant to move in arrest of judgment as he might have done before the passing of the act. In the present state of your professional knowledge I think this too early a place to offer you information on the subject of motions in arrest of judgment generally. It is enough for me to say that this motion is the right course of proceeding when a person has been tried and found guilty upon an indictment, charging facts which, though proved, may not amount to an indictable offence. By means of this motion the opinion of the court is taken upon the question so raised. This course was pursued in Burdett's case; but the Court of King's Bench decided that the letter set forth in the indictment, and of the publication of which he had been found guilty, was a seditious libel, and therefore an indictable offence. So the motion failed, and the defendant was sentenced to pay a fine of 2,000*l.*, and to be imprisoned three months. He was, as you know, a man of rank and of great wealth, celebrated, for many years, as a political agitator, in and out of parliament.

The use of the word "shall," in the first section of the statute of which I have stated the substance, has been deemed by some judges to impose on a judge trying an indictment for a libel the duty of stating, whether he thinks it proper to do so or not, his opinion on the point, whether the publication in question is or is not a libel. Such seems the grammatical import of the word "shall;" even though the words "according to their or his discretion" are added. But it may be asked what, then, is the use of the words "according to their or his discretion?" They are superfluous if they only mean that the discretion of a judge is to guide him in his mode of expressing an opinion which he is required to give. They were, I should think, intended by those who composed the section, to reduce the force of the word "shall," implying a command, to that of the word "may," implying permission. This

view is supported by the use of the words "in like manner as in other criminal cases;" for it so happens that in ordinary trials for crimes, the judges do every day exercise their discretion whether or not to express their own opinions on the questions which juries are to decide. Nay, cases now and then occur in which judges, stating carefully all the arguments bearing either way, think it right to avoid giving, or appearing to give, a bias to the opinions of juries, by making their own opinions known on the points thus the more really left to the impartial consideration of those by whom they are to be disposed of. From pursuing this course, when in his discretion a judge might think fit to do so, he is supposed to be debarred by the peremptory terms of the statute.

In your law reading you will sometimes be surprised at the way in which the words "shall" and "may" are twisted about and compared with their contexts so as to make either read as if it were the other.

Whether the usual construction of the section or mine be the right one, it is manifest that the safest way is for a judge, trying an indictment for a libel, to state his own opinion. If the usual construction is right, he obeys the command contained in the statute; if my construction is right, he exercises a power which the statute gives him or leaves him in the possession of.

However this may be, one thing is evident, that the enactments in the statute are confined to trials of indictments and informations, and do not extend to actions in which persons complaining of libels seek to recover damages. With reference to such actions the statute does not impose any duty on the judges.

Accordingly, quite irrespectively of the statute, a judge trying an action for an alleged libel may or may not, though he most usually does, in the exercise of his discretion, declare to the jury his own opinion whether the publication is or is not a libel. But whether he does so or not, it is for the jury to decide the question by their verdict.

There is one other point in respect of which it is my wish that you should have a clear notion of the distinct functions of a judge and a jury trying an action for a libel. When the circumstances of a publication make it a privileged communication, if it is alleged that, by malice on the part of the defendant, the privilege has been lost, it is for the judge to say, in the first place, whether there is any evidence of malice, either apparent on the face of the publication or shown by other circumstances. If he thinks there is no evidence of malice he ought to nonsuit the plaintiff. If he thinks there is evidence of malice he ought not to direct the jury to find a verdict for the plaintiff; he ought to submit the evidence of malice to the jury, leaving to them to decide by their verdict whether malice is proved. This point and the effect of malice may be well illustrated by an example.

In 1855 an action was tried (*a*), in which the plaintiffs, who were printers, sued the defendant, who was deputy clerk of the peace for a county, for an alleged libel, being a letter, addressed by him to the finance committee of the county, explaining the circumstances under which he had ceased to employ the plaintiffs to print certain papers at the expense of the county. The letter concluded thus: "but "under the circumstances I have stated, it will be seen "that I had no alternative but to adopt the course I have "taken, rather than submit to what appears to have been "an attempt to extort a considerable sum from the county "by misrepresentation."

Lord Campbell, before whom the cause was tried, decided that, though the main part of the letter was of a privileged character, the concluding sentence, not being confined to a statement of facts, but imputing motives to the plaintiffs, was beyond the privilege; and he directed the jury to find a verdict for the plaintiffs. The jury did so, assessing the damages at 50*l.*

(*a*) *Cooke* v. *Wildes*, 24 Law Journal, New Series, Queen's Bench, 367, 1855.

The Court of Queen's Bench granted a new trial on the ground that, the concluding sentence being properly deemed by the judge as some evidence of malice by which the letter might lose its privilege, he ought not to have taken upon himself to decide in effect that it proved malice, but ought to have left that point to be decided by the jury.

This case supplies an excellent illustration of the difference between evidence and proof. Evidence consists of facts adduced before a tribunal and treated as proof, or not, according to the result of the consideration which is given to them. The same facts which are only evidence during a trial are regarded as proofs of the point which in the result they are deemed to establish. A verdict of guilty gives the character of proof to what was until then only evidence of guilt.

The error into which the chief justice was led by a precedent, now overruled, was that of treating as proof of malice a portion of the letter which he ought to have presented to the jury as only evidence of malice, to be, or not to be, invested by the verdict with the character of proof.

You will meet with many instances of imputations of motives depriving publications of the character of privileged communications, and of comments having the same effect. The safe course in penning a privileged communication of a private nature is not to go beyond a statement of facts believed to be true. Comments, remarks, arguments, inferences, insinuations, epithets should be avoided.

Of course what I have just said cannot apply to literary criticism or to discussions of the conduct and characters of public men. In criticism and discussion, comments, remarks, arguments, inferences, are indispensable; insinuations or epithets may or may not be fair and justifiable.

I shall now quote, as most worthy of your attention, some excellent remarks made by Mr. Justice Best, afterwards Lord Wynford, in Sir Francis Burdett's case:—

"My opinion of the liberty of the press is, that every man

" ought to be permitted to instruct his fellow subjects;
" that any man may fearlessly advance any new doctrines,
" provided he does so with proper respect to the religion
" and government of the country; that he may point out
" errors in the measures of public men, but he must not
" impute criminal conduct to them. The liberty of the
" press cannot be carried to this extent without violating
" another equally sacred right; namely, the right of cha-
" racter. This right can only be attacked in a court of
" justice, where the party attacked has a fair opportunity
" of defending himself. Where vituperation begins, the
" liberty of the press ends."

The only criticism I offer on this passage is, that probably what the judge meant to say would have been more clearly expressed if, instead of the phrase " criminal conduct," he had used the phrase " criminal motives." The errors of public men are criminal or not according to their motives. This is a most important subject at this time, inasmuch as the most favourite reading is now, undoubtedly, that of the leading articles, on passing events, printed in the newspapers, and of these none appear to interest their readers more than those which deal with the personal characters of public men. The power with which many of these articles are written gives them an influence over the minds of a vast number of persons. The writers of them do well when they are restrained by sentiments like those expressed by Lord Wynford, and having the sanction of the law of the land.

LECTURE XLVII.

1. *Crime.*
2. *Intention.*
3. *Negligence.*
4. *Manslaughter.*
5. *Murder.*
6. *Libel.*
7. *Bookseller.*
8. *Statute.*
9. *Presumption rebutted.*
10. *Qui facit per alium facit per se.*
11. *Newspaper.*
12. *Proprietor.*
13. *Ignorance.*
14. *Absence.*
15. *Editor.*
16. *Printer.*
17. *Publisher.*
18. *Declaration at Stamp Office.*
19. *Evidence.*
20. *Newspaper filed at Stamp Office.*
21. *Note at the end of a Newspaper.*
22. *Discovery of Printer, Publisher, or Proprietor.*

In the law of libel are found two exceptions to the rule, or rather principle, that to a crime a criminal intention is essential. It has been said, that these are the only exceptions to the rule. It may be difficult to say whether there is a third instance of the principle being disregarded when negligence is treated as criminal, as, for instance, when a person, whose culpable negligence causes the death of another, is convicted of manslaughter. In a case of manslaughter by negligence, had the culprit intended to cause death, or had he inflicted it by means of an act intentionally unlawful, though not intended to cause death, his guilt would have been that of murder. It may therefore be said, with a degree of truth, that manslaughter by negligence is a case of crime without a criminal intention. My answer to this reflection may seem founded on too fine a distinction. I suggest that the indifference to consequences, evinced by culpable negligence, is, if not a species of criminal intention, an equivalent to it.

But really a theory is not needed to justify punishment for culpable negligence leading to the loss of life.

Of the two exceptions, I am now to treat of, to the rule or principle which makes a criminal intention an essential part of a crime, the first is that of a bookseller selling, in the course of trade, a book, without knowing its contents. He is, if it contains defamatory matter, deemed guilty of publishing it, and is liable to an action at the suit of the person defamed, or to be indicted as for a crime. The same law applies to a book containing treasonable, seditious, blasphemous, or immoral passages, which a bookseller may happen to sell without being informed of its contents.

So a bookseller may be prosecuted for the publication of a book bought in his shop during his absence by reason of illness. He may find himself in the same predicament in respect of a book brought into his stock and sold to a customer, while he is quietly living at his country house or travelling abroad. It may be a book of the existence of which he has never heard.

The effect of the law on this point is, in the cases I have supposed and in others which might be suggested, that a bookseller may be prosecuted as a criminal for an act not accompanied by any criminal intention on his part. To make this severe law applicable, it matters not whether the sale of a book happening to be libellous, be effected by a bookseller's own hands or by those of a shopman, without his knowledge, and even in his absence; it is enough that it is bought in his shop.

If this state of the law is to be justified, it must, I think, be by means of an argument like that, by which is accounted for the rule making a master liable for the consequences of his servant's negligence, causing damage to another, provided the negligence occurs in the performance of the servant's duty to his master. It might well happen that the shopmen of booksellers might not be persons of sufficient property to be able to pay damages or fines; and their masters, being answerable for them, have a strong motive to be careful in the selection and control of them.

To this it may be added, that this law may serve to deter booksellers from attempting, for the sake of gain, the sale of defamatory or seditious or immoral books, screening themselves from punishment by a pretended or intentional ignorance of what is done in their shops during their absence. It is easy to suppose the case of a person being careful not to know what is done in his shop. That there have been unscrupulous booksellers, whose guilty intention or knowledge not being susceptible of direct proof, might have escaped punishment, but for the rule I am discussing may be true enough; still one's mind cannot get rid of the reflection, that it is contrary to natural justice to enforce a rule, according to which innocent men may be punished, lest the guilty should escape. In the administration of justice it may happen, that, by the application of general rules, the justice of which is unquestionable, innocent persons may suffer. The rule in question is so framed as intentionally to sweep into the net, which it spreads, the innocent and the guilty, lest the latter should escape. Can this be right? It is inconsistent with what many, more especially in this country, deem a first principle of jurisprudence, that it is better that many guilty should escape rather than that one innocent man should suffer.

With reference to the responsibility of a bookseller in respect of libels published in his shop, I have now stated the effect of the common law. I do not think it quite clear that this responsibility is qualified by an enactment contained in an act of parliament (*a*) passed in 1843, to other parts of which I shall direct your attention in my next lecture. The provision to which I refer is contained in the seventh section, and is in these words:—"Whensoever upon the trial of any indictment or information for "the publication of a libel, under the plea of not guilty, "evidence shall have been given which shall establish a "presumptive case of publication against the defendant, by "the act of any other person by his authority, it shall be

(*a*) 6 & 7 Victoria, chapter 96.

" competent to such defendant to prove that such publi-
" cation was made without his authority, consent, or
" knowledge, and that the said publication did not arise
" from want of due care or caution on his part."

My doubt as to the effect of this enactment on a bookseller's common law liability, in respect of a sale in his shop, is founded on the possibility that, applying the maxim: qui facit per alium, facit per se, a court of justice might deem any sale in his shop, even in his absence or without his knowledge, to be a sale by himself, and not merely presumptive evidence of a sale by him; and the section I have quoted applies only to presumptive cases of authorized publication.

The second exception to the rule or principle which makes criminal intention an essential part of a crime is of greater importance than the first. It is that of the proprietor of a newspaper, not interfering personally in its management or publication, but who is nevertheless deemed guilty of publishing any libellous matter it may happen to contain, though inserted without his knowledge.

The same law applies to the proprietor of a newspaper containing, without his knowledge, treasonable, seditious, blasphemous, or immoral passages.

So the proprietor of a newspaper may be treated as guilty of publishing a libel printed in it during his absence from his business by reason of illness. He may find himself in the same predicament in respect of a libel printed while he is quietly living in his country house or travelling abroad. His first knowledge of it may be a casual perusal of it.

The effect of the law on this point is, in the cases I have supposed, and in others which might be suggested, that a proprietor of a newspaper may, without any criminal intention or knowledge on his part, be treated as a criminal for the criminal act of another person, the editor who is plainly the proper object of punishment.

If this state of the law is to be justified, it must, I think,

be by means of arguments like those which I have brought forward in respect of the law making a bookseller responsible as a criminal for sales in his shop without his knowledge. To those arguments may, with reference to the proprietor of a newspaper, be added the reflection that he supplies capital for, and derives profit from a trade, one of the ordinary risks of which arises from the danger that defamatory or otherwise illegal matter may find its way into the publication.

This should serve to make the proprietor of a newspaper most careful in the selection and control of his editors; and if he chooses to leave any editor in the management of the publication uncontrolled by his interference, he knows the responsibility which he so incurs. He is, as it were, a surety for the good conduct of the person whom he entrusts, and from whose services he derives a profit.

An act of parliament (*a*) passed in 1836, contains provisions which facilitate the prosecution of the printers, publishers and proprietors of newspapers containing libels.

The sixth section is a very long enactment, the effect of which is to require, in the case of every newspaper, a written declaration to be left at the Stamp Office. The declaration must state the title of the newspaper, the building in which it is to be printed, the building in which it is to be published, and also the name, addition, and place of abode of the printer, of the publisher, and of the proprietor, and must be signed by each of them.

The eighth section provides to the effect that a certified copy of every such declaration shall be admitted in all proceedings, civil and criminal, and upon every occasion whatsoever, touching the newspaper mentioned in it, or anything contained in the newspaper, as conclusive evidence of the truth of all such matters set forth in the declaration as are by the act required to be therein set forth, against every person by whom it is signed. The section further provides to the effect that whenever a cer-

(*a*) 6 & 7 William IV., chapter 76.

tified copy of any such declaration is produced in evidence, and a newspaper shall be produced, intituled in the same manner as the newspaper mentioned in the declaration, and whereof the names of the printer and publisher and place of printing are the same as those mentioned in the declaration, it shall not be necessary for the plaintiff, informant, or prosecutor to prove that the newspaper was purchased of the defendant or at his house, shop or office.

The thirteenth section is a very long enactment, according to the effect of which a copy of every newspaper, signed by the printer or publisher is to be promptly delivered at the Stamp Office, that it may be produced in evidence in any proceeding, civil or criminal, against the printer, publisher, or proprietor.

The fourteenth section requires that there shall be printed at the end of every newspaper, the name, addition and place of abode of the printer and publisher, and a description of the building in which it is printed and published, and a statement of the day on which it is published.

The nineteenth section contains a provision, that if any person shall file any bill in any court for the discovery of the name of any person concerned as printer, publisher, or proprietor of any newspaper, or of any other matters relative to the printing or publishing of any newspaper, in order the more effectually to bring or carry on any suit or action for damages alleged to have been sustained by reason of any slanderous or libellous matter contained in any such newspaper respecting such person, it shall not be lawful for the defendant to plead or demur to such bill, but such defendant shall be compellable to make the discovery required: provided always, that such discovery shall not be made use of as evidence or otherwise in any proceeding against the defendant, save only in that proceeding for which the discovery is made.

I have yet in reserve for your attention parts of the statute law in respect of libels, more interesting than the dry details of the latter part of this lecture.

LECTURE XLVIII.

1. *Slander.*
2. *Libel.*
3. *Practical Difference.*
4. *Action.*
5. *Indictment.*
6. *Attorney-General.*
7. *Public Prosecutor.*
8. *Letter to Person defamed.*
9. *Anonymous Letters.*
10. *Private Prosecutor.*
11. *Resentment.*
12. *Misdemeanor.*
13. *Choice of Remedies.*
14. *Assault.*
15. *Nuisance.*
16. *Libel.*
17. *Actions. Multiplicity.*
18. *Particular Injury from Public Wrong.*
19. *Seditious Libel.*
20. *Felony. Right of Action suspended.*
21. *Felony. Definition.*
22. *Misdemeanor. Definition.*
23. *Accessory before the Fact.*
24. *Injuria sine damno.*

It is right that I should now say more than I have hitherto said of the remarkable practical difference between slander and libel: the person injured by slander may maintain an action for damages; but the defamer cannot be prosecuted as for a crime; a person injured by a libel may, in like manner, maintain an action for damages, or the libeller may be prosecuted and punished as for a crime.

The chief reason for regarding the publication of a libel as a misdemeanor, for which the offender may be indicted, is the obvious tendency of a libel to provoke a breach of the peace. It is, therefore, an offence in which the community is interested; and cases sometimes occur in which the Attorney-General, the chief law minister and adviser of the Crown, not having judicial functions, finds it his duty to prosecute libellers. It is on the ground of the tendency of a defamatory libel to provoke a breach of the peace that the law deems the sending, to the very person defamed, a libellous letter or other writing, a publication of the libel and treats it as an indictable offence, though it is not seen by any other person.

This tendency to provoke a breach of the peace is not a reason for regarding a letter or other writing sent to the person defamed in it, and not seen by another, as an injury in respect of which he sustains damages, to be recovered by means of an action. Therefore he cannot maintain an action against his calumniator, but he may prosecute him as for a crime.

This odious crime, that of sending defamatory, abusive or insulting letters, whether anonymous or not, is more common, and more commonly overlooked, than the inexperienced in the world are aware of. Indeed there are persons whose guilty propensity it is to annoy others by means of offensive letters, and it would be well if, by the prosecution of some of them, the law on the subject were made more generally known; but usually persons thus attacked, though often deeply injured in their feelings, shrink from adding to the injury by making themselves, and the wrongs done them, the subjects of public discussion.

In most cases in this country prosecutions for crimes are conducted by the persons directly injured; the law trusting to their resentment, or to their sense of public duty, as supplying a sufficient motive for their undertaking that which is, in most countries, the duty of public prosecutors. Accordingly an indictment for a libel is usually preferred at the instigation of the person injured.

But in respect of this, or any other misdemeanor, a person directly injured has generally, not only, a choice of either bringing an action or preferring an indictment, but he may at the same time do both: he may bring an action for the private wrong, while, for the public wrong, he is prosecuting the criminal. Thus a person assaulted may both sue for damages and prosecute by indictment. However vexatious his conduct may be deemed he has a legal right to persist in proceeding in both ways at the same time.

The use I have made of the phrase "directly injured" will remind you that, to prevent multiplicity of actions, an

action is not maintainable in respect of a public wrong, unless by a person sustaining from it a damage peculiar to himself, and not common to himself and others. You have read illustrations of this in my lectures on markets and fairs, and on ferries and mills.

Of the same point an excellent illustration is that given by Blackstone, and explained by Stephen thus: "It is "requisite, in order to sustain an action for damages, that "the plaintiff should have sustained some loss or incon- "venience, whether actual or nominal, of a kind proper "and peculiar to himself—for where the damage is of "a merely public character, affecting the subjects of the "realm at large, as well as the plaintiff, no civil action lies, "although the law considers the injury in that case as "amounting to a crime, and consequently as a fit subject "for an indictment. Thus no action can be maintained for "an encroachment on the highway; but the offender is liable "to be indicted as for a public misdemeanor. Wherever ex- "traordinary damage, indeed, is sustained by an individual, "he has in general a right of action as for redress of "a civil injury, though the case may in its circumstances "also amount to a crime. Thus, in the case last supposed, "if by means of a ditch dug across a public way, which is "a common nuisance, a man or his horse suffer any injury "by falling therein, then, for this particular damage, which "is not common to others, the party shall have his action."

In this passage the word "nominal" is used by Stephen evidently with reference to the principle, of which I have so often occasion to speak, that for injury without actual damage, injuria sine damno, an action is maintainable.

Now let us consider the case of a seditious or immoral libel. Applying to a publication of this sort, the purport of the commentator's explanation, it may be said that the injury is of a merely public character, affecting the community at large, and not any one particular person more than others. Generally, therefore, no one person can maintain an action in respect of it. But it may happen that a seditious or immoral libel may contain libellous

words affecting the character of some one person. For this particular injury he is entitled to maintain an action. You see the direct analogy between this case and that of a person injured by means of a ditch dug in a public highway.

The law enabling a person directly injured to sue for damages or to prosecute the wrongdoer as for a crime, or to pursue both remedies at the same time, is confined to the class of crimes called misdemeanors, that is, indictable crimes not being felonies. For an injury sustained by means of a felony, an action cannot in the first instance be maintained. It is the duty of every person injured by a felony to disregard his private wrong and, acting for the public good, to devote his energies to obtain by means of a prosecution, the punishment of the criminal. It is possible to suppose the case of a libel being also a felony. It is, for instance, a felony to procure a felony to be committed. The person guilty of this is called an accessory before the fact. It is evident that this guilt may be incurred by means of a letter, which may amount to a libel in respect of which a private person might, but for the felony, be entitled to maintain an action.

When however, by the acquittal or conviction of the criminal, the prosecution for a felony is concluded, the private right of the injured person to redress, previously suspended by his public duty to prosecute, comes into active existence; and he may maintain an action against the person who has wronged him, unless, indeed, an acquittal has been obtained by means of his own collusion.

As in the definition of felonies and misdemeanors, as distinguished from each other, felonies are said to be indictable crimes, convictions for which cause the forfeiture of the property of the offenders; and misdemeanors are said to be indictable crimes, convictions for which do not cause forfeiture, the right to sue, for damages, a person who has been convicted of felony may scarcely deserve to be termed a remedy.

LECTURE XLIX.

1. *Slander.*
2. *Libel.*
3. *Truth.*
4. *Slander. Actionable, not Criminal.*
5. *Libel. Criminal, though true.*
6. *Rule qualified by Statute.*
7. *Truth and the Public benefit.*
8. *Truth only.*
9. *Costs.*
10. *Libels. Defamatory. Punishment.*
11. *Threats, proposals, offers, in respect of Libels.*
12. *Libels. Extortion.*
13. *Threatening Letters.*
14. *Treasonable Libel.*
15. *Seditious Libel.*
16. *Libel on a class of Persons.*
17. *Indecent or Immoral Libel.*
18. *Blasphemous Libel.*

To an action by a person slandered or libelled, to recover damages for the injury, it is a good defence that the imputation against him is true. Denying him personally a remedy, the law imposes on him the duty of submitting to the injury, as to one of the consequences of his own misconduct or misfortune. No doubt this is, in most cases, consistent with natural justice, so far as the defamed person alone is concerned. It would be a strange law that should enable a person, of whose misconduct the truth has been spoken, to recover damages from the person speaking it.

But though the law does not give a person, injured by the truth being spoken or published of him, a right to recover damages, it treats, as will be seen directly, a defamatory libel as a crime, even though the imputation it contains be true. Permitting the person defamed to prosecute his defamer as for a crime, the law gives the former a sort of redress.

It is one of the propensities, one of the habitual amusements, of mankind, to talk and write of, and censure and ridicule, the characters, the peculiarities, the tempers, the bodily and mental deformities, the eccentricities, the misfortunes, and the misconduct of each other. The law thus deals with this propensity. It gives a remedy, by action,

to a person injured by untrue defamatory words; but it does not treat as a crime defamatory words, whether true or false. It gives a remedy, by action, to a person defamed by a false libel. But it also takes notice of the tendency of a defamatory libel, whether true or false, to provoke breaches of the peace, and therefore treating a libel as an indictable crime, it provides that to an indictment or information for a libel the truth of the libel is no defence. Such is the rule of the common law, qualified to some extent by statute law, as I purpose to explain in this lecture.

The common law rule is well explained by Russell, in his book on Crimes, edited by Greaves, in a passage which I shall now quote as a good introduction to the details of the most important modern legislation in respect of the law of libel:—

"The ground of the criminal proceeding is the public "mischief, which libels are calculated to create in alienating "the minds of the people from religion and good morals, "rendering them hostile to the government and magistracy "of the country; and where particular individuals are at- "tacked, in causing such irritation in their minds as may "induce them to commit a breach of the public peace. "The law, therefore, does not permit the defendant to give "the truth of the libellous matter in justification: any "attempt at which, in the instances of libels against re- "ligion, morality, or the constitution, would be attended "with consequences of the greatest absurdity; and, in the "case of libels upon individuals, might be extremely un- "just, and could never afford a substantial defence to the "charge. A libel against an individual may consist in the "exposure of some personal deformity, the actual existence "of which would only show the greater malice in the de- "fendant; and even if it contain charges of misconduct "founded in fact, the publication will not be the less likely "to produce a violation of the public tranquillity. It has "been observed, that the greater appearance of truth there

" may be in any malicious invective, it is so much the more " provoking."

You perceive, at the end of the passage quoted, a glance at the sort of truth contained in the adage: the greater the truth, the greater the libel: the paradox I spoke of in a former lecture.

In 1843, an act of parliament (*a*) was made "to amend " the law respecting defamatory words and libel."

The purport of the sixth section may be thus shortly stated: upon the trial of an indictment or information for a defamatory libel the defendant may, with or without a plea of not guilty, plead the truth of the matters charged in the libel, and allege that it was for the public benefit that those matters should be published, and aver the facts showing the publication to be for the public benefit. Without such a plea the truth of the libel is not to be inquired into. The truth of the libel is not, of itself, to amount to a defence; to make it a sufficient defence, it must also be proved that the publication was for the public benefit. If the defendant is convicted the court may, in the sentence on him, consider whether his offence is aggravated or mitigated by his plea and by the evidence given to prove or disprove it. In stating the purport of the section I have thought I could present it more clearly to your minds by altering, as I have done, the order in which its several parts are arranged in the section itself.

According to the effect of the section, if at the trial of an indictment or information for a libel, the defendant pleads only not guilty, no evidence of the truth of the libel can be received; if he pleads the truth of the libel, alleging also the publication of it to be for the public benefit, evidence of the truth may be received, but he ought not to be acquitted, unless both propositions are made out to the satisfaction of the jury: the alleged truth and the alleged public benefit; if the jury find the alleged truth of the libel, but negative the alleged public benefit, the defendant ought to

(*a*) 6 & 7 Victoria, chapter 96.

be found guilty, but the truth of the imputations he has made against the prosecutor may be treated by the court as mitigating his offence and his punishment.

The eighth section enacts to the effect that in the case of an indictment or information by a private prosecutor for a defamatory libel, if judgment be given for the defendant, he shall recover his costs from the prosecutor; and if, upon a special plea to such an indictment or information, the verdict be for the prosecutor, he shall recover his costs, by reason of the plea, from the defendant.

The third, fourth and fifth sections enact the punishments for defamatory libels. I think the effect of these sections will appear to you more clearly if, in stating their effect, I invert the order in which they occur in the statute. I shall thus begin at the least, and end at the most aggravated of the species of libels termed defamatory libels, those by which private persons are injured, as distinguished from seditious libels and other libels affecting the community and not merely affecting individuals.

According to the fifth section, the punishment for a malicious defamatory libel is a fine or imprisonment or both; the term of the imprisonment not to exceed one year.

According to the fourth section, the punishment for a malicious defamatory libel, aggravated by the offender knowing the libel to be false, is imprisonment for not more than two years and a fine.

The third section enacts the punishment of three years' imprisonment, with or without hard labour, for persons guilty of any of several specified offences thus described: "if any person shall publish or threaten to publish any "libel upon any other person, or shall directly or in- "directly threaten to print or publish, or shall directly or "indirectly propose to abstain from printing or publishing, "or shall directly or indirectly offer to prevent the printing "or publishing of any matter or thing touching any other "person, with intent to extort any money or security for

" money or any valuable thing from such or any other " person, or with intent to induce any person to confer or " procure for any person any appointment or office of profit " or trust."

As to the most atrocious of all libels: a letter or writing, threatening, for the purpose of extortion, to kill any person, or to burn or destroy property; or, for the purpose of extortion, accusing, or threatening to accuse, any person of any of several specified crimes, or a letter or writing demanding with menaces, and without any reasonable or probable cause, any chattel, money or valuable security, statutes, which are a part of our criminal law, declare the crime to be a felony, and enact, as the punishment for it, penal servitude for life or not less than three years, or imprisonment, with or without hard labour, for a term not exceeding four years. If the criminal is a male he may, in addition to imprisonment, be sentenced to be once, twice, or thrice publicly or privately whipped.

Having thus specified the punishments for defamatory libels, meaning libels affecting individuals, I will now make my treatment of the libel law more complete by stating the punishment for libels affecting the community generally, whether at the same time defaming particular persons, or not.

Between a treasonable libel, not amounting to actual high treason, or, to use the right technical phrase, not being an overt act of high treason, and a seditious libel, there does not appear to be any essential difference. The punishment for either, or for seditious words, is a fine or imprisonment, or both. I have made you familiar with the case of Sir Francis Burdett, who was both fined and imprisoned for a seditious libel.

Partaking of the nature of a seditious libel, and also of a defamatory libel, is a libel by which a class or body of persons are defamed. The punishment for this offence is a fine or imprisonment or both. The Court of Queen's

Bench permitted an information for a libel on the clergy of the city of Durham.

For an indecent or immoral libel the punishment is also a fine or imprisonment or both.

For a blasphemous libel the punishment is the same; except that for certain forms of blasphemy specified in the unrepealed part of a statute passed in the reign of King William the Third (*a*), a person may be made subject to various disabilities and imprisoned for three years.

(*a*) 9 & 10 William III., chapter 10, section 1.

LECTURE L.

1. *Libel. Apology.*
2. *Newspaper. Apology.*
3. *Periodical Publication.*
4. *Malice.*
5. *Negligence.*
6. *Damages.*
7. *Payment into Court.*
8. *Type.*
9. *Part of Newspaper.*
10. *Presumption of Authority rebutted.*
11. *Clerk.*
12. *Servant.*
13. *Judicial Opinions.*

Of the statute of 1843, the first two sections, the consideration of which I have postponed to that of others, contain enactments, of a very novel character, giving effect to apologies for libels, and having the further effect of investing juries with the function of deciding whether an apology made or offered is sufficient.

The first section enables the defendant, in any action for defamation, to give in evidence, in mitigation of damages, that he had made or offered to make an apology, either before the commencement of the action, or, in case of its being commenced before an opportunity of making or offering an apology, as soon afterwards as he had an opportunity.

The word defamation as used in this section must mean either sort of defamation, whether by spoken words or by means of a libel.

The second section enacts to the effect, that in an action for a libel contained in a newspaper or other periodical publication the defendant may plead that the libel was inserted without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in his newspaper or periodical publication a full apology, or if his newspaper or periodical publication is published at intervals exceeding a week, that he had offered to publish the apology in any newspaper or periodical publication to be

selected by the plaintiff. Filing such a plea the defendant may pay money into court.

You know that if, in an ordinary action for damages, the defendant pays money into court, pleading that the plaintiff has not sustained greater damage than the amount so paid, and if the jury think that the damages sustained by the plaintiff do not exceed the money paid into court, they give a verdict for the defendant. The section before us is so worded that, to entitle a defendant to a verdict on the ground of the money paid into court being sufficient, the defendant must prove also the absence of malice and negligence, and the insertion of an apology as pleaded. This being explained you will the better understand a case decided in the Court of Exchequer in 1859 (*a*).

In that case a decision was given as to the meaning of the word apology, as used in the section of which I have just stated the substance. The action was for a libel contained in a newspaper, and the defendant pleaded that the libel was inserted without actual malice and without gross negligence, and that the defendants published in their newspaper, the day after the publication of the libel, a full apology, and they paid forty shillings into court.

At the trial it appeared that the apology was printed under the heading of "Notice to Correspondents" and in very small type. The jury found that the libel was published without actual malice and without gross negligence; and that the apology was sufficient in its terms, and was inserted in good faith; and that forty shillings were sufficient damages; but they also found that the apology should have been printed in larger type, and should have been inserted in a different part of the newspaper. Upon this finding the jury, by the direction of the judge, gave a verdict for the plaintiff with one shilling damages. But for the finding that the apology should have been in larger

(*a*) *Lafone* v. *Smith*, 28 Law Journal, New Series, Exchequer, 33, 1859.

type and should have been in a different part of the paper the verdict would have been entered for the defendant, forty shillings being sufficient damages if the apology had been properly inserted.

The Court of Exchequer refused a new trial. Chief Baron Pollock said, "I think that the word apology, "whether it is 'full apology' or 'apology' alone, means "inserted so that it may operate as an apology; and I "think, putting it in very small type, as it is put here, in "type suitable for that part of the paper in which it "appears,—that is, the type in which the notices to corre- "spondents usually are made, is not enough. The place "where it is put, the mode in which it is inserted, as well "as the terms, being part of the apology, I think the jury "were quite right in finding as they did, and their finding "merely amounts to this, that the defendants did not "insert a full apology, as they are required to do by the "statute."

Mr. Baron Bramwell said, "When the statute says a "person may insert an apology, it must mean effectually "insert; it could not mean that it would be sufficient for him "to insert an apology in such a way that in all probability "no one will see it, or, if anybody, only a few persons."

Again, the same baron said: "One does sometimes read "the notices to correspondents out of curiosity, to look at "the odd miscellany they present, and to wonder at the "strange ideas that must have given rise to the questions "that are put; but no person reading the paper for news "would look to that part of the paper, nor is there any- "thing to attract the attention of readers to it."

Mr. Baron Watson said, "The libel itself is contained "in that part of the paper to which attention, particularly "of persons in the town of Liverpool, is drawn, namely, "under the head of local intelligence; and the subject- "matter is a contested election in one of the wards of the "borough of Liverpool; and that part one would suppose "would be the proper place to put the apology."

Mr. Baron Channell made a remark to the effect, that in the opinion of the jury the defendants, under all the circumstances, had not really inserted an apology sufficient to entitle them to a verdict. He might, I think, have expressed better what he meant to say, if he had said they had not inserted a real apology.

In this good, plain common-sense judgment, the literal meaning of the words of the statute are disregarded, but their spirit is wisely observed. The apology, as worded, was a full apology, and it was inserted in the proper newspaper; and this is all that the statute appears in strictness to require. But, not being inserted in proper type, and in a proper place, it was not such an effectual apology as the statute, properly construed, intends.

The very words of the seventh section of the statute of 1843 enabling a defendant to an indictment or information for a libel to rebut, by evidence, a presumption of a publication by him, by the act of another person, are quoted in my forty-seventh lecture. In that lecture expression is given to a doubt whether booksellers may be able to avail themselves of the enactment in question.

It may be instructive to you that I should put one or two cases to which, probably, the enactment might be deemed to be applicable.

The first case I suggest is that of the clerk of a solicitor or of a merchant, entrusted, as is not unusual, to write, in his master's absence, business letters in his master's name, and writing upon some occasion a letter in substance and in its terms apparently within the scope of his authority, but happening to contain a statement or remark defaming the character of another person. Now, suppose the master to be indicted for the libel, and suppose also the judge presiding at the trial to hold the circumstances to establish a presumptive case of publication by the defendant, I think it probable that he might also rightly hold the defendant competent to offer evidence for the purpose of proving that the publication was without his authority,

consent or knowledge, and was not occasioned by a want of due care or caution on his part. Establishing those two points to the satisfaction of a jury, I think the defendant would be entitled to be acquitted.

The other case I put is that of one of a firm of partners writing, in the name of the firm, upon some occasion a business letter, in substance and in its terms apparently within the scope of the authority of a partner to write for the firm, but happening to contain a statement or remark defaming the character of another. Now suppose a partner, other than the actual writer of the letter, to be indicted and tried for the libel, and suppose the judge to hold the circumstances to establish a presumptive case of publication by the defendant, I should think he might also rightly hold the defendant to be made competent, by the statute, to rebut the presumption.

Upon most questions it is most difficult to anticipate the opinions of judges. When you are in practice you will learn the requisite caution not to give very positive opinions on the construction and application of acts of parliament so recent as not to have received judicial consideration.

LECTURE LI.

1. *Courts of Justice. Public.*
2. *Secrecy.*
3. *Reports.*
4. *Newspapers.*
5. *Public Opinion.*
6. *Influence on Judges, Juries, Advocates.*
7. *Judicial Character.*
8. *Reports. Defamatory.*
9. *Public Meeting.*
10. *Letters to Newspapers.*
11. *Parliament. Debates.*
12. *Publication.*
13. *Obiter dicta.*
14. *Amendments.*

HAVING, in my last lecture, made known to you a peculiar privilege expressly given to persons engaged in the publication of newspapers and other periodical publications, I shall now proceed to notice some parts of the law of libel which, though not peculiar to the persons so engaged, are more frequently applicable to them than to any other class of persons. To all classes these parts of our law are nevertheless of great interest.

As in this country the usages and customs of the people are the law of the land, there is a special propriety in one of those usages imposing on the courts of justice the duty of sitting in public. Our law strictly forbids secrecy in the administration of justice.

The advantages of this practice is great. Not only are the courts checked and kept right by the presence of an audience, and thus are avoided the oppression and injustice which have always been the characteristic of secret tribunals, but the people themselves are instructed in the rules and principles by which the conduct of every man must be guided.

But, however large may be the hall in which a court sits, only a very minute proportion of the people can be present at one time. The want of space is made good by the noble art of printing, which serves to place every tribunal in the presence of the whole world. Lawyers

have always had their books of reports of decisions on points of law. All classes of men have now their newspapers, by the perusal of which they may instruct themselves, not only in the theory of legal rules and principles, but in their practical application. I will not now discuss any difficult question as to the limits of the due influence of public opinion on the conduct of judges and juries and advocates, and the danger of permitting that influence to pass those limits. It is enough for me to say, that the public opinion as it now exists, and as it is now expressed by means of the press, may, with reference to any subject worthy of its attention, be the opinion of all thinking men, and not merely of a portion of them which may happen to crowd into the presence of a tribunal.

Probably the influence of public opinion is more real and more legitimate in the formation of the character of the judges generally, regarded as a body of men devoted to one object, than in the control of the conduct of any of them separately.

It constantly happens that, in reports of proceedings in courts of justice, whether in law books or in newspapers, or by other means, defamatory words are printed or libels are copied. The law for the public good makes these reports, if published in good faith and without malice, privileged communications. Any private damage, or any tendency to provoke a breach of the peace, is disregarded for the sake of general advantages outweighing those particular inconveniences.

Thus, in a case in the Court of Queen's Bench (*a*), Lord Campbell said: "A fair statement of what takes place in a "court of justice is privileged, and it is a most beneficial "law that it should be so, as the public have a great in- "terest in knowing what occurs there, and the inconve- "niences which can arise from such a publication are "infinitesimally small in comparison with the benefits

(*a*) *Davidson* v. *Duncan*, 26 Law Journal, New Series, Queen's Bench, 104. 1857.

" which result from it." The other judges gave expression to the same principle; with this addition, that, to be entitled to the privilege, a report must be substantially correct.

In the case to which I have just referred the decision was, that, to an action for a libel contained in a newspaper, it was no defence that the alleged libel was a true and accurate report of the proceedings at a public meeting of commissioners acting under an act of parliament for the improvement of a town.

Lord Campbell said: "If this plea be good, a fair and "impartial account of what takes place at a public meeting "may be published, whatever harm it may do, from a "county meeting to petition parliament down to a parish "vestry meeting. At such meetings there may be a great "number of things spoken which are perfectly relevant, but "are highly injurious to the character of others, and if a "fair report of such statements is justifiable, in what con- "dition would the injured party be, as he would have no "opportunity of vindicating his character."

Mr. Justice Wightman said: "It would be very dan- "gerous if persons sitting at a public meeting might take "the opportunity of publishing that which affects the "character of others with impunity. Such a doctrine, as "is contended for by the defendant, would render a report "of all that is said at every public meeting, held for the "redress of a public grievance, a privileged communi- "cation."

This decision of the Court of Queen's Bench forces on the attention of the editors of newspapers their duty to be cautious in preparing for the printer the reports they receive of the speeches made at public meetings. Sooner or later also an adverse decision of a court of justice may effectually bring to their notice the legal, in addition to the moral, responsibility to be more cautious than some of them are in admitting into their columns libellous letters, whether anonymous or bearing signatures.

From the readiness with which signed defamatory letters

are printed in newspapers, I have sometimes thought that some editors may have an erroneous notion that an authentic signature relieves a publisher from responsibility. They should reflect that a signature may not lessen, and may add to, an injury, which the exercise of a judicious firmness on their part may prevent. At the same time, considering the habits of some resentful persons, to be always writing to the newspapers, amounting sometimes to a sort of monomania for libelling others, I cannot doubt that newspaper editors have often occasion, in the exercise of a wise discretion, to refuse to print letters addressed to them. It is easy to suppose the difficulty of their position when, in this way, they are curbing the resentful feelings of others.

I shall not dwell on the immense benefit the community derives from the publication of the debates in parliament; now that both houses not only do not enforce their rules against, but in different ways actually sanction, their publication. For the public good the law, as in the case of proceedings in courts of justice, gives to reports of parliamentary debates the character of privileged communications. But to be entitled to the privilege they must be substantially correct reports of what actually occurred.

This is well expressed by Mr. Justice Wightman in the case relating to reports of proceedings at public meetings. He said: "As to the publication of what takes place in a "court of justice, it must be a substantially correct report "of what has passed, and this protection is conceded on "the ground of the superior benefit accruing from the "communication of what takes place there. With respect "to parliamentary proceedings, the publication of them is "protected, yet if a member of the House of Commons "were himself to publish, out of the house, what purports "to be an amended statement of what he has said there, "as was the case in *The King* v. *Creevey* (*a*), he could not "justify. Therefore, that privilege must also be taken

(*a*) 1 Maule & Selwyn, 273.

" with certain limitations; it must be a correct report of " what is actually spoken in parliament." An obiter dictum of a judge is of great value when it has the merit of expressing, with great precision or clearness, a rule or a principle established by other authorities; but there is a great danger, which practising lawyers are not sufficiently careful to avoid, in giving to an obiter dictum, usually only an argument, or an illustration of a rule or principle or argument, the weight of a direct authority. In the case on which this lecture may be regarded as a commentary, Lord Campbell said: "I quite concur in the doctrine, that a " member of parliament who publishes an amended version " of his speech is liable for that, although he might have " spoken the same words in his place with impunity. " But if a member were to repeat bonâ fide to his con- " stituents what he said in the house, for the purpose of " explaining his conduct to them, I think he would be pro- " tected." This dictum was useless, if the Chief Justice only meant to say that a member of parliament may repeat correctly to his constituents what he has said in the house; for any correct report made by any person of what is said in parliament is a privileged communication. To be of any force, the dictum should mean that a member of parliament reporting to his constituents a speech made by him in the house has some greater privilege than another person reporting the same speech would have. I cannot conjecture what this greater privilege can be, unless Lord Campbell meant to say that a member of parliament, provided he speaks or writes in good faith, may report to his constituents, otherwise than accurately, what he has said in parliament, to the injury of another person. For my part I should think the want of accuracy would destroy the privilege.

Obiter dicta are worked by ingenious advocates into authorities and arguments in a way which must sometimes surprise the learned men who have uttered them; and I should not wonder to hear what Lord Campbell said,

quoted as an authority, or used as an argument, for some such dangerous proposition as this: provided a member of parliament, in good faith, intends, for the purpose of explaining his conduct to his constituents, to report to them fairly something he has said in parliament, he may with impunity so amend his speech, as to make his report inaccurate to the injury of another.

In framing this possible proposition, you perceive I have used the word amend in the sense in which it is used in parliament; where it means to change or alter with the object of making better; though, according to experience, that object is as often missed as attained by what is called an amendment. You have not forgotten the amendment, spoken of in my forty-second lecture, made in a bill in its passage through the House of Lords.

LECTURE LII.

1. *Parliament.*
2. *Debates.*
3. *Courts. Reports.*
4. *Parliamentary Papers. Defumatory.*
5. *Stockdale* v. *Hansard.*
6. *Sheriffs.*
7. *Ministers of Courts.*
8. *Attachment.*
9. *Habeas Corpus.*
10. *House of Commons.*
11. *Contempt.*
12. *Commitment.*
13. *Privilege.*
14. *Parliamentary Papers. Statute.*

You know well the constant practice of each house of parliament to order reports, papers, votes and proceedings to be printed, and many of them to be published. As one of the ordinary functions of either house, especially of the House of Commons, is the investigation by means of committees of alleged grievances and of the alleged misconduct of various government officers, contractors with government and others, it frequently happens that parliamentary papers, especially the reports of committees, contain statements defamatory of various persons. It might have been anticipated, that the principle on which the law invests with the character of privileged communications, reports of proceedings in courts of justice, and of debates in parliament, would be applied to any papers, the publication of which might be sanctioned by either house of parliament. I refer to the principle, that the damage which private persons may sustain from reports of judicial proceedings and parliamentary debates is disregarded for the sake of the public good to which those reports are greatly conducive. It would seem reasonable that, if a defamatory speech made by a member of parliament may be published by him or any other person, much more should it be lawful to publish by the authority of either house a report of one of its committees, or a vote of the house itself, though happening to be defamatory. But such was not the law before the year 1840.

Before that year, in an action (*a*) by a person named Stockdale against Hansard, the printer, for a libel, the defendant pleaded to the effect that the defamation complained of was part of a document which had been, by order of the House of Commons, laid before the house, and had become a part of the proceedings of the house, and that it was printed and published by the defendant by order of the house; and that the House of Commons had resolved and declared that the power of publishing such of its reports, votes and proceedings, as it shall deem necessary and conducive to the public interest, is an essential incident to the constitutional functions of parliament, more especially to the Commons house of parliament as the representative portion of it. The Court of Queen's Bench decided that the House of Commons itself had not a right to publish defamatory matter, except for the use of its own members; and that the plea was not a good defence to the action. Afterwards, in another action by the same plaintiff against the same defendant, for a similar cause of action, judgment was given for the plaintiff, to recover damages; and the damages having been assessed by a jury, process was issued to levy them and the plaintiff's costs by the sale of the defendant's goods. The sheriffs of London and Middlesex having, in obedience to the process of the Court of Queen's Bench, levied the amount of the damages and costs, the House of Commons resolved that the money was levied in contempt of the privileges of the house, and ordered the sheriffs to refund it to the defendant. The sheriffs not obeying this order, the House of Commons resolved that they were guilty of a contempt of the house, and committed them to the custody of the serjeant-at-arms; and in his custody they remained for a long time.

The Court of Queen's Bench ordered the sheriffs to pay the money to the plaintiff, and notwithstanding their continued imprisonment by order of the House of Commons,

(*a*) *Stockdale* v. *Hansard*, 9 Adolphus & Ellis, 1.

the court ordered them to be attached, that is, to be imprisoned for disobedience of the order of the court.

The sheriffs sued out a writ of habeas corpus, in obedience to which the serjeant-at-arms carried them before the Court of Queen's Bench. His return, setting out a warrant signed by the speaker, reciting a resolution of the house, that the sheriffs had been guilty of a contempt, without specifying the particulars of the contempt, and ordering them to be committed, was decided by the Court of Queen's Bench to be sufficient; and the sheriffs remained in the custody of the serjeant-at-arms.

I might, but I do not, speak of this conflict as having existed between a legislative assembly, asserting what it deemed one of its own privileges, and a high court of justice, declaring and enforcing what it deemed to be the law. I prefer speaking of it as an unfortunate conflict between parliamentary privilege and common law; and, as I think that parliamentary privilege, as a part of the law, should be regulated by law, and that there is great danger to liberty in permitting any branch of the legislature to place itself above the law, I think the House of Commons ought not to have persisted in protecting its printer from the consequences of his disobedience to the law, as declared by a legal tribunal.

It was well said by Lord Denman (*a*): "I infer, from the "resolutions brought before us, that the House of Com- "mons disapprove of our judgment in the former case "between these parties, and I deeply lament it; but the "opinion of that house on a legal point, in whatever "manner communicated, is no ground for arresting the "course of law, or preventing the operation of the Queen's "writs in behalf of every one of her subjects who sues in "her courts."

The house ought to have indemnified its own servant, the printer, and ought not to have punished the ministers of the law and of justice for the performance of their duty.

(*a*) *Stockdale* v. *Hansard*, 11 Adolphus & Ellis, 263.

Possessed of the giant's power, and not forbearing to use it, the Commons made their victims, not the Lord Chief Justice of England and his brethren, for declaring the law according to their consciences, and enforcing it by their judgment and their process, but the poor sheriffs of London and Middlesex, on whom, as the ministers of the courts at Westminster, the law imposed the duty of executing the process, and the peril of imprisonment for neglect to execute it.

In tracing my short history of this conflict which lasted many months, I have omitted, besides some technical points, many circumstances and arguments interesting in themselves, but not necessary for the purpose of making known to you the state of the law which led to the enactment of the statute, the purport of which I shall now state.

The statute (*a*) I speak of was passed in 1840. It recites, that it is essential to the exercise and discharge of the functions and duties of parliament, and to the promotion of wise legislation, that no obstruction or impediment should exist to the publication of such of the reports, papers, votes or proceedings of either house of parliament, as such house may deem fit or necessary to be published.

The first section is an enactment enabling any defendant in any civil or criminal proceeding for or in respect of the authorized publication of any report, paper, vote or proceeding of either house of parliament to present to the court in which the proceedings are taken, or a judge of the court, if it is one of the superior courts, a verified certificate signed by the Lord Chancellor, or the Lord Keeper, or the Speaker of the House of Lords, or the clerk of the Parliaments, or the Speaker of the House of Commons, or the clerk of that house, stating that the report, paper, vote or proceeding in question was published by order or under the authority of the House of Lords or of the House of Commons; and the court or judge shall immediately stay

(*a*) 3 & 4 Victoria, chapter 9.

the proceeding, and the same and every process therein shall, by virtue of the act, be put an end to, determined and superseded.

The first section applies only to publications made by the direct authority of either house. The second section provides for cases of copies of them published without such authority, and enables the defendant in any proceeding for or in respect of any such copies to obtain in a summary way an order to stay the proceeding. You have often seen, in newspapers, copies of parliamentary papers, the publication of which is thus protected; and you know their great value to yourselves and other young men who watch with interest the events of cotemporary history.

This carefully drawn statute provides, in its third section, protection for those against whom proceedings are taken for printing any extract from, or abstract of, any authorized parliamentary publication, and directing that, in any such proceeding, the defendant shall be acquitted, if the jury shall be of opinion that the extract or abstract was published bonâ fide and without malice.

LECTURE LIII.

1. *Parliament.*
2. *Courts of Record.*
3. *Four Superior Courts.*
4. *Assizes.*
5. *Quarter Sessions.*
6. *Justices of the Peace.*
7. *Coroner.*
8. *Pie Poudre Court.*
9. *Court Leet.*
10. *Sheriff's Tourn.*
11. *Privilege.*
12. *Prerogative.*
13. *Nemo debet esse judex in propriâ causâ.*
14. *Record.*
15. *Recognizances.*
16. *Contempts.*
17. *Attachment.*
18. *Courts not of Record.*
19. *Manor Courts.*
20. *Copyholds.*
21. *Surrenders and Admissions.*
22. *Old County Courts.*
23. *Elections.*
24. *Ordinary Jurisdiction transferred.*
25. *New County Courts.*
26. *Expressio unius est exclusio alterius.*
27. *Prevarication.*
28. *Perjury.*

I AM now arrived at the end of my lectures on my selected instances of great changes of the common law made by statute law; and I am now at the place fixed on for the commencement of my lectures on constitutional law; but I cannot yet part with the case of Stockdale against Hansard, fixing, as it does, my attention on the part of the common law which gives to every court of record, and to each of our two houses of parliament the privilege or prerogative of punishing, by its own authority, without recourse to any other tribunal, for contempts offered to itself.

I know not that the word prerogative has ever been applied in the manner I have just applied it; but, for my present purpose, I prefer it to the word privilege; for I think that while a privilege implies in its ordinary meaning some benefit to the person who possesses it, and that he may exercise for his own sake, any power implied in it, the word prerogative means a power which a person or tribunal possesses for the sake of the community, and does not

imply a benefit to the person or tribunal exercising it, more than to the rest of the community.

You perceive that in speaking of the word privilege, I do not refer to it in the more general sense in which it is sometimes used in the civil law, that of an exceptive law or private law affecting only a person or class of persons, whether beneficially or not. In this sense a disability or a penalty may be imposed by a privilege; and an act of parliament attainting a man of high treason is a privilege.

The etymology of the two words privilege and prerogative helps to establish between them a difference which may be thus expressed: a privilege, in its ordinary sense, is an exception to a law; a prerogative is a law above other laws; it is a privilege of a member of parliament that he cannot be, as other men may be, arrested for debt; it is a prerogative of the Crown to pardon criminals. It is a privilege of a person attending a court of justice as a witness to be free from arrest for debt; it is a prerogative of the court, if he is arrested, to make a summary order for his discharge from custody.

It is a power, or what I term a prerogative, of every court of record to order any person guilty of a contempt of the court to be imprisoned or fined, or to be both fined and imprisoned; and it is the practice of the four superior courts, the Chancery, the Queen's Bench, the Common Pleas, the Exchequer, to treat a person disobeying their orders as guilty of contempt, and to issue against him a process called an attachment, by force of which he is imprisoned.

Could this power be considered as a privilege of a tribunal by which it is exercised, it must also be deemed an exception to the rule: nemo debet esse judex in propriâ causâ.

That a court may have the power of punishing in a summary way for contempts offered to itself, it must be a court of record; that is, it must be a court, the records of which are regarded of so high authority as to be con-

clusive evidence of everything stated in them; no one is permitted to dispute the truth of any fact so stated: res judicata pro veritate accipitur.

On one very trivial point the law is precise: a record, to be really a record, must be written on parchment, not paper.

Of courts of record, the most conspicuous are the four high courts I have just mentioned: the Chancery, the King's Bench, called, during the reign of a Queen, the Queen's Bench, the Common Pleas and the Exchequer; and there are others, of which I shall mention only a few, leaving you to become acquainted with the rest in your reading and practice.

In enumerating among the courts of record those constituted by the commissions under which the judges hold the assizes, I abstain from anticipating the account I intend to give of them in a future lecture. I now only name them. They are the commissions of oyer and terminer, of gaol delivery, of nisi prius, and a commission of the peace.

By a commission of the peace is also constituted in every county a court of record, called the court of quarter sessions.

You know that of the court of quarter sessions every justice of the peace for the county is a member; but you perhaps do not know, I do not think you can have read in rhyme (*a*), that every justice of the peace "a court of record is himself." Such is the law. For instance, whenever a justice binds over a person to keep the peace or to appear at the assizes or quarter sessions, he signs a document, called a recognizance, written on parchment and being, in point of law, a record.

One court of record is that of the coroner. In this court it is the duty of that officer to investigate, with the assistance of a grand inquest, the cause of the death of every person whose death is violent or sudden, or who

(*a*) Anstey's Pleader's Guide.

dies in prison. I state the duty of the coroner to be, to hold an inquest on the body of every person who dies suddenly, by reason of the express terms of an ancient unrepealed statute (*a*) defining his duties, and notwithstanding decisions of the Court of King's Bench, that a coroner ought not to hold an inquest on the body of any person dying suddenly, unless there is reasonable ground to suspect that his death was caused by murder or manslaughter. This is a most remarkable instance of legitimate and positive legislation being controlled by judicial and indirect legislation; the judges having evidently, though unconsciously, decided according to their notions of what the law ought to be, rather than according to the actual law as dictated by parliament. The judges appear to have overlooked, that, according to the tenor of the statute, the coroner and his jury are to search out suspicious circumstances, which might otherwise be overlooked or concealed. I should make this judge-made law the subject of a distinct lecture, were it not that, at the time I am writing (*b*), a bill is pending in parliament to regulate the office of coroner. It is to be hoped that the controversy which has been raised as to the power of the coroner may thus be settled.

The market court, called the pie poudre court, spoken of in my thirty-third lecture, is a court of record.

As of courts of record, so of courts not of record, I content myself with mentioning a few instances, saying but little of their jurisdiction. I take this course with the less reluctance, by reason of the jurisdiction of many courts not of record having become obsolete, and of the practice of holding many others being discontinued.

Incident to every manor is a court called the court baron. Frequently, by force of a grant from the Crown, or prescription from which a grant is presumed, the lord of a manor may hold a court leet. In a manor in which there

(*a*) 4 Edward I., statute 2, de officio coronatoris.
(*b*) The summer of 1860.

are copyholders, surrenders of, and admittances to, copyholds are properly made in a court called a customary court; but, by virtue of modern acts of parliament, they may be made before the lord of the manor or his steward out of court.

You will sometimes, when you look at manor court rolls, see one court described by the three several titles of the court baron, the court leet, and the customary court of the lord of the manor. Of these three courts the court baron and customary courts are not courts of record. The leet is a court of record.

Of a court baron and of a customary court I may have occasion to speak when I explain to you what a manor is, as I ought to have done in one of my earlier lectures before treating of the law of copyholds.

Of a court leet I may possibly speak, as a matter of curiosity, when I am treating of courts of criminal jurisdiction. For every hundred, that is, one of the large districts into which a county is divided, there ought properly to be holden by the sheriff a court leet, called the sheriff's tourn, meaning his circuit. Sometimes by grant or prescription there is a lord of a hundred by whom the leet should be holden. But I must be careful not to let the subjects of the court leet and the old county court, of which I am about to speak, lead me astray from the performance of the duty I have assumed: that of teaching you the laws of England in their present state; not the almost obsolete relics of the Saxon institutions, interesting to every intelligent man, but which I must leave you to learn the details of from other sources.

From the earliest times down to our time, in every county, a court has been holden, called the county court. Of this, which is not a court of record, all the freeholders of the county are the judges. In this court the freeholders elect the coroners for the county, and the verderors of any forests within it. At the same court the freeholders, and, since the Reform Act of 1832, all the county electors,

elect the knights of the shire, as the county members of parliament are called.

The ordinary jurisdiction of the county court, until the year 1847, was a jurisdiction in respect of actions for debts of less than forty shillings. It had also other judicial functions, and might have others by force of special writs from the Crown.

In the year 1846, an act of parliament (*a*) gave the Queen a power, exercised in 1847, to establish throughout England and Wales new courts called county courts, and, by its third section, transferred to them "all the jurisdiction "and powers of the county court for the recovery of debts "and demands."

This statute declares every new county court to be a court of record, and gives it other jurisdictions and powers in addition to those transferred to it; and many more have been added by subsequent acts of parliament.

Being a court of record, a new county court would have, as of course, the common law power of a court of record to punish for contempts; but I hesitate to say it has this power, by reason of the principle: expressio unius est exclusio alterius; for it so happens that the statute of 1846 contains, in its one hundred and thirteenth section, an enactment to the effect, that if any person shall wilfully insult the judge of a county court, or any juror, bailiff, clerk or officer of the court, during his sitting or attendance in court, or in going to or returning from the court, or shall wilfully interrupt the proceedings of the court, or otherwise misbehave in court, any bailiff or officer of the court may, with or without the assistance of any other person, by the order of the judge, take the offender into custody and detain him until the rising of the court; and the judge may commit the offender to prison for any time not exceeding seven days, or impose upon him a fine not exceeding five pounds, and in default of payment commit him to prison for a time not exceeding seven days, unless

(*a*) 9 & 10 Victoria, chapter 95.

the fine be sooner paid. In my own experience I have known a very few instances of the exercise of this power to the extent of persons being detained in custody until the rising of the court, and only two to any further extent. In one of these two instances a person was fined for an insult to the judge, and misbehaviour in court. In the other a person was committed to prison for seven days, his misbehaviour being manifest and gross prevarication, and the example having a perceptibly beneficial effect on the conduct of witnesses at subsequent courts. I remember similar beneficial results from commitments for prevarication made by judges of the superior courts in the exercise of their power to commit for contempt. The immediate effect of a commitment for prevarication, as an example, is greater than that of a prosecution for perjury; the result of the latter being seen at a period indefinitely postponed, and being most uncertain. But false evidence may be consistent throughout, and therefore not be prevarication, the essence of which is the inconsistency of different parts of the evidence of the offender. In a clear case of perjury, not being prevarication, the proper course, to bring the false witness to punishment, is for the court to order a prosecution for perjury. For this purpose ample powers are given, by an act of parliament passed in 1851 (*a*).

Reading my next lecture you will perceive that the common law power, of a court of record, is exercised in respect of contempts not within the definition of the statute power of the county court. Though each one of these powers resembles the other; yet also each differs from the other: nullum simile est idem. It may follow, in the absence of authority I do not say it does follow, that the express power excludes the implied power: expressio unius est exclusio alterius.

(*a*) 14 & 15 Victoria, chapter 100, section 19.

LECTURE LIV.

1. *Contempts.*
2. *Jury. Challenges severed.*
3. *Trial. Publication.*
4. *Order not to publish Evidence pending Trial.*
5. *Queen's Bench. Superintendence of Inferior Criminal Courts.*
6. *Gaol Delivery.*
7. *Certiorari.*
8. *Judge-made Law.*
9. *Fine.*
10. *Exchequer. Revenue Court.*
11. *Estreat.*
12. *Contempt. Commitment. No Appeal from Superior Court.*
13. *Appeal from Inferior Court.*

You will understand better the common law power of a court of record to commit for contempt, if I now give a few instances of its having been exercised.

In 1821 (*a*), a person named Davison was tried before Mr. Justice Best, at that time a judge of the King's Bench, afterwards Lord Wynford, Chief Justice of the Common Pleas, for a blasphemous libel. In a defence, which Davison read, he reviled the Christian religion, and attacked the characters of persons not before the court, and therefore not able to defend themselves. The judge having admonished him, in vain, more than once, to discontinue his misconduct, said, at length, he must use means to restrain him. Davison replied: "My lord, if you have "your dungeon ready, I will give you the key." For this contempt the judge fined him twenty pounds. Afterwards, for reviling the Holy Scriptures the judge fined Davison forty pounds, and for defaming the bishops another forty pounds. Davison making a submission, the nature of which is not stated in the report, the judge took off the fines. The defendant having been found guilty, a motion was made for a new trial, on the ground that the imposition of the fines so intimidated the defendant, that he

(*a*) *The King* v. *Davison*, 4 Barnewall & Alderson, 329.

omitted some most material parts of his defence. The Court of King's Bench refused a new trial, and the judges expressed their approval of the imposition of the fines.

In another case (*a*), a witness for a prosecution struck the defendant, in the lobby of the court, after the close of the trial. The witness was brought into court, and the judge, Mr. Justice Coleridge, committed him to custody for three days for the contempt.

Lord Cottenham, when Lord Chancellor (*b*), committed to prison a suitor in Chancery, who was a barrister and a member of parliament, and who, after attending as counsel before one of the masters of the court, addressed to the master a letter, expressed in threatening terms, to induce him to alter an opinion he was supposed to have formed on the case.

In 1856, Vice-Chancellor Stuart (*c*) committed to prison a plaintiff in Chancery for writing to the defendant a letter threatening that, if the suit should go up for judgment, he would be prosecuted for swindling, perjury and forgery. The Vice-Chancellor quoted these words, spoken by Lord Cottenham in the preceding case: "The power of committal "is given to courts of justice for the purpose of securing "the better and more secure administration of justice. "Every writing, letter or publication which has for its "object to divert the course of justice is a contempt." The Vice-Chancellor added: "A threatening letter must "be considered as having equally that object, whether "addressed to a suitor seeking justice, or to a judge or "officer of the court."

When by one indictment several persons are charged with high treason or felony, they may, if they think fit, by challenging separately the jurors who are called, be tried separately. When this is done, the prisoners are said to sever

(*a*) *The King* v. *Wigley*, 7 Carrington & Payne, 4.

(*b*) *Lechmere Charlton's Case*, 2 Mylne & Craig, 216.

(*c*) *Smith* v. *Lakeman*, 26 Law Journal, New Series, Chancery, 305. 1856.

in their challenges. Some objecting to some jurors, others objecting to other jurors, it might be that of those who are summoned there would not be twelve left unchallenged. The prosecutor is thus driven to put some of the prisoners on their trial separately from others, usually one at a time. You have read of the Cato street conspiracy which led to the trials in 1820, of Thistlewood and several others for high treason. The prisoners being charged by one indictment, and being tried before a commission of gaol delivery for the gaol of Newgate, severed in their challenges, and the Crown lawyers put them on their trials one at a time. At the commencement of the first trial, that of Thistlewood, the Chief Justice Abbott, afterwards Lord Tenterden, strictly prohibited the publication of the proceedings on that or any other day, until all the trials should be brought to a conclusion. After the conclusion of the second trial, that of one Ings, and before the commencement of the third, Clement, the publisher of the Observer newspaper, published in it a fair, true and impartial account of the evidence. The court of gaol delivery treated this disobedience of their order as a contempt, and ordered Clement to attend the Court to answer for it. The order for his attendance was served at his office, and he did not attend in pursuance of it. The court fined him five hundred pounds for the contempt.

To make my account of this case clear to you, I am obliged to anticipate some parts of my lectures on the constitution of courts relatively to each other; but I will endeavour to say now, on this subject, just enough for my present purpose. The Court of Queen's Bench has the superintendence of all inferior criminal courts, restraining them, if they exceed their jurisdiction, correcting their errors, and in other respects keeping them in order. Of these inferior courts the court of gaol delivery is one. That the legality of the order fining Clement might be questioned, an application was made to the Court of King's Bench for a writ called a certiorari, to remove the order

into that court (*a*). The application was resisted, and, after argument, the writ was refused, the ground of the refusal being that the Court of King's Bench thought that the imposition of the fine was perfectly legal.

Precedents were cited of courts making orders forbidding the publication of evidence pending trials, and instances were mentioned of such orders having been disobeyed, but there did not appear to be any instance of any person being punished for disobeying any of them. Irrespectively of precedents, the counsel and afterwards the judges argued the propriety and expediency of an order prohibiting the publication of evidence until the case in which it is given is closed; and the judges treated the several trials on one indictment as one proceeding. In the argument as to the propriety of the rule the counsel for Clement had, I think, greatly the advantage of their adversaries and of the judges; for it seemed to me, reading the arguments, which I desire you also to read, that the unquestionable advantages of presenting to the public from day to day true accounts of the proceedings of a court of justice, greatly outweigh the disadvantages which the publication of them might cause. I confess I should have been better pleased if, on this occasion, the Court of King's Bench engaged in reality, though not in form, in judicial legislation, had given a decision, that an order prohibiting the publication of evidence is contrary to good policy, unreasonable and void.

To my mind one argument has presented itself, appearing to me to be entitled to weight: that the delivery of evidence in an open court to which the public has a right of access, being itself a publication of the evidence, it is nugatory to say that the evidence shall not be published. It is already published. If such an order is available for any purpose, it can only be to prevent printed reports. It cannot stop the mouths and pens of byestanders, and prevent their imperfect reports in conversation, and by means of letters. It gives a mischievous currency to reports likely to be imperfect or incorrect, and

(*a*) *The King* v. *Clement*, 4 Barnewall & Alderson, 218.

impedes those which are likely to be true. This is one of a few instances in which the law seems to shrink from the means of truth, because of the possibility that the truth may work mischief.

You may consider my presumption in questioning the policy and legality of the decision of the Court of King's Bench, the greater when I tell you that in the same case the Court of Exchequer gave a similar decision. Writing in the country I am not able to see a report of the proceedings in the Exchequer; but a digest enables me to give you an intelligible account of them.

When a fine is imposed by a court of record, the payment of it to the Crown is enforced by the process of the Court of Exchequer, being the court the original and proper jurisdiction of which concerns the revenues of the Crown. That the Exchequer process may be issued, an extract, called an estreat, of the record of the order imposing the fine is transmitted to the court. In technical language the fine is said to be estreated.

The order imposing the fine on Clement having been estreated, its legality was questioned before the Exchequer, and that court decided (*a*) that the fine had been lawfully and most properly imposed.

The legality of an order of either of the four superior courts for the punishment, by fine or imprisonment, of any person for contempt of the court cannot be questioned in any other court. For instance, in the year 1850, a prisoner was brought by means of a writ of habeas corpus, before the Court of Queen's Bench, and the return to the writ stated a commitment by the Court of Chancery for a contempt, the contempt being a disobedience of an order of the Court of Chancery; the Court of Queen's Bench refused to receive affidavits to show that the Lord Chancellor who made the order was an interested party (*b*).

(*a*) *Re Clement*, 11 Price, 68.

(*b*) *Re Dimes*, 19 Law Journal, New Series, Queen's Bench, 308. 1850.

In this case Mr. Justice Erle thus explained a difference, in respect of the power to punish for contempt, between the superior courts and inferior courts: "There appears to "me to be a very clear distinction between the present "case and those cited of the quarter sessions and inferior "jurisdictions. In those cases the proceedings are, by the "law of the land, subject to our review, but no certiorari "lies from this court to the Court of Chancery to remove "proceedings taken there for the purpose of inquiring "whether they are regular or not."

You bear in mind Clement's case cited in my last lecture, in which an order of the Chief Justice of England and other commissioners of gaol delivery was brought, as an order of an inferior court, before the Court of King's Bench, and its legality was discussed.

LECTURE LV.

1. *Superior Court. Contempt.*
2. *Nemo debet esse judex in propriâ causâ.*
3. *Parliament. Contempt.*
4. *No Appeal.*
5. *House of Lords.*
6. *House of Commons.*
7. *Great Inquest of the Nation.*
8. *Oath.*
9. *Court.*
10. *House of Commons. Witness ordered to attend.*
11. *General Warrant.*
12. *Exchequer Chamber.*
13. *Arbitrary Power.*

BLACKSTONE, quoting a passage from Coke, says: "The "whole of the law and custom of parliament has its "original from this one maxim; 'that whatever matter "'arises concerning either house of parliament, ought to "'be examined, discussed and adjudged in that house to "'which it relates, and not elsewhere'" (*a*).

Consistently with this maxim, each of the two houses of parliament has a privilege or prerogative resembling that of a superior court of record: the legality of an order of either house for the punishment of a person adjudged by the house to be guilty of a contempt of it, cannot be in any manner questioned.

Every superior court of record, and each house of parliament is said to be the sole judge of contempts offered to itself, and no other tribunal has a power to review its adjudication in respect of a contempt. Tribunals, possessing this arbitrary power, ought to be most careful to repress, in the exercise of it, every resentful feeling. Unless they succeed in doing this, their power may become a practical infringement of the rule: nemo debet esse judex in propriâ causâ.

Speaking in my fifty-third lecture of several courts of record I did not mention the highest of all, the House of

(*a*) 1 Blackstone's Commentaries, 163; 4 Coke's Institutes, 15.

Lords. My reason for this omission was, that though the House of Lords has, in its character of a court of record, the same power as any other court of record, to commit for contempts, it has also, like the House of Commons, the same prerogative in its still higher character of a branch of the legislature.

The House of Commons is not only not a court of record, but it is not in any respect a court. It is for this reason that, according to the common law, it has not the authority incident to every court, that of administering an oath. For particular purposes many acts of parliament have conferred on the house, or on its Speaker, or on its committees or its officers, power to administer oaths, but these special powers do not make it a court. By an act of parliament (*a*), a power is conferred on a parish constable to administer an oath to the valuers of goods distrained for rent; but this does not make a constable a court. The illustration is not the worse for the comparison being between widely different authorities,—one of the states of the realm, and one of the inferior ministers of the law.

In the journals of parliament you may read of some startling commitments, as for contempts, for affronts and injuries to peers and commoners, having no relation to the circumstance of their being members of parliament. For many years this abuse of power has ceased, and it is the practice of each house to inflict punishment for those acts and omissions only, which can be deemed contempts of the house itself.

To illustrate the parliamentary power in respect of contempts, and its exemption from all control, I shall refer to a few only of the cases in which it has been exercised.

Many years ago, the House of Lords voted that a person named Flower had been guilty of a breach of privilege in publishing a libel upon a member of the house, and ordered him to pay a fine of a hundred pounds and to be

(*a*) Statute 2 William and Mary, session 1, chapter 5, section 2.

imprisoned six months and until payment of the fine. By means of a writ of habeas corpus he was brought before the Court of King's Bench (*a*), which refused to discharge him from custody.

More recently the House of Commons voted that a person named Hobhouse had by the publication of a libel on the house been guilty of a breach of their privileges, and they ordered him to be committed to Newgate during their pleasure. Upon his being brought into the Court of King's Bench (*b*), in pursuance of a writ of habeas corpus, the court refused to discharge him from custody.

In 1844, the House of Commons ordered a person named Howard to attend at the bar of the house to be examined touching some matters under discussion. The order not having been obeyed, the house ordered that Howard should be sent for and brought before it, in the custody of the serjeant-at-arms, and that the Speaker should issue his warrant accordingly. The Speaker signed a warrant which, reciting that the House of Commons had ordered that Howard should be sent for in the custody of the serjeant-at-arms, required and authorized the serjeant-at-arms to take him into custody.

Howard, having been arrested in pursuance of the warrant, brought an action in the Court of Queen's Bench against the serjeant-at-arms for an assault and false imprisonment. The question whether the warrant justified the arrest was argued (*c*) at great length by counsel and by the judges whose opinions differed.

According to the opinions of the majority of the judges, Lord Denman, the Chief Justice, Mr. Justice Coleridge and Mr. Justice Wightman, the Court of Queen's Bench decided that the general warrant, not stating any offence, nor any adjudication of any offence, nor any charge of any

(*a*) *The King* v. *Flower*, 8 Durnford & East, 314.

(*b*) *The King* v. *Hobhouse*, 3 Barnewall & Alderson, 420.

(*c*) *Howard* v. *Gosset*, 14 Law Journal, New Series, Queen's Bench, 367. 1845.

offence, nor any ground or reason for taking Howard into custody, was bad and did not justify his arrest, and that the action was maintainable.

Though the arguments of the judges have reference rather to the form of the Speaker's warrant in the particular case than the general power of the House of Commons to commit for contempts, they contain passages asserting, in eloquent and convincing terms, that the law of the land is as supreme over the House of Commons as it is over the Crown, or any other lawful authority. This is the proposition which Lord Denman and his then colleagues in the Queen's Bench had, a few years before, asserted in Hansard's case, and which the House of Commons had at that time disregarded.

The decision in Howard's case was brought before the Court of Exchequer Chamber, consisting, when sitting as a court of appeal from the Queen's Bench, of the judges of the Common Pleas and Exchequer (*a*). The judgment of the Exchequer Chamber, reversing the decision of the Queen's Bench, was delivered by Mr. Baron Parke, now Lord Wensleydale.

The judgment states, as indisputable, principles which I reduce to three propositions;—the first being, that the House of Commons, forming the great inquest of the nation, has a power to order the attendance of witnesses, and in case of disobedience, to order them to be brought to the bar to be examined. An alleged power to order a witness to be brought in custody to the bar, without a previous order for his attendance, had been referred to in the Queen's Bench; but the Exchequer Chamber declined to express an opinion as to the existence of such a power.

The second of the three propositions is, that if a person ordered by the House of Commons to attend and answer a charge of contempt and breach of privilege, wilfully disobeys the order, the house has power to order him to be

(*a*) *Gosset* v. *Howard*, 16 Law Journal, New Series, Queen's Bench, 345. 1847.

taken into custody and brought to the bar to answer the charge. It may be remarked, that this proposition does little else than state a power implied in the general power to commit for contempts.

The third proposition is, that the house alone is the proper judge, when these powers are to be exercised.

The judgment of the Exchequer Chamber contains references to the very general forms of writs of attachment for contempts issued by the superior courts, and contains this passage: "The possibility of abuse which "is urged as an objection to the power of either house to "issue its mandates in such a form, is no valid argument "to its existence. If it were, it would apply equally to all "the superior courts, which, without doubt, have the power "of issuing theirs, in the forms before referred to; and it "would apply also to the other admitted legal powers of "these courts, which may be abused without adequate "remedy. In case of an improper exercise of this power "of attachment by a court of law or equity, or by either "branch of the high court of parliament, there can be no "appeal; the only remedy is by application to the sense of "justice of each court; and it would be improper to "suppose that any one of them would be more likely to "abuse the power, or less likely to grant redress, than "another."

In the judgment it is also said: "The difference between "the opinion of this court and that of the majority of the "Court of Queen's Bench is only this: that they construe "the warrant as they would that of a magistrate; we "construe it as a writ from a superior court. The "authorities relied upon by them relate to the warrants "and commitments of magistrates; they do not apply to "the writs and mandates of superior courts, still less to "those of either branch of the high court of parliament."

I have now worked my way round to Hansard's case, my point of departure into my long excursion into the law of contempts.

After every dissolution of parliament the conduct and character of the dissolved House of Commons are subjects of history, and may be freely discussed and censured, without any fear of the displeasure of the House of Commons for the time being.

In Hansard's case the then House of Commons, though only a part of the legislature, and therefore not the legislature, set itself above the law, and in the exercise of the arbitrary power, its possession of which is recognized by legal authorities, punished, by a long imprisonment, ministers of the law and of courts of justice for acting, according to their bounden duty, in obedience to the law and to the legal process of the courts. This flagrant abuse of power leads to several serious reflections.

Arbitrary power exercised by a popular assembly, especially liable to be influenced by passion or prejudice, and to be moved by sudden impulse, may be, at the least, as dangerous to political and personal liberty as if exercised by the Crown. To me it seems, and I have lately considered the subject with great care, that I might not express to you any hastily-formed opinions on the point, that the Crown itself might more safely than the House of Commons be entrusted with a power which it does not possess, like that of a court of record to commit for contempts or breaches of its privileges or prerogatives. One of my chief reasons for thus thinking is, that for every act of the Crown there are legally responsible ministers; for any act of the House of Commons not any person is subject to any real responsibility; and it is too well known, that the moral responsibility of a multitude of persons has but a slight effect upon them collectively or any of them separately. This last reflection serves to destroy the analogy insisted on between a superior court, consisting of a few judges responsible to parliament, and a house of parliament utterly free from legal responsibility.

If ever an attempt should be made to disarrange our present happy balance of political power, the chief danger

would be in the usurpation of unlimited power, not by the Crown, but by the House of Commons. Unlimited power is apt to become tyranny; and the tyranny of many is according to history, at the least, as oppressive as the tyranny of one. Now, we have seen that, according to a practice which appears to have the sanction of the law, the House of Commons may even now imprison any man at its own pleasure, without the legality of its order being in any manner questioned. A fearful use might, during an important political struggle, be made of this power by a House of Commons happening to be influenced by demagogues. It would be wise and patriotic if, at this time, when good order prevails, and no attempts at change are made, otherwise than by regular legislation, the two branches of the legislature would, by a self-denying statute, subject the exercise of their power to imprison their fellow-subjects to the revisal, in each case, of the judges of all the superior courts assembled. Those high magistrates made, by one of the wisest of our laws, independent of the Crown, are equally independent of either house of parliament separately, and might be safely entrusted with this addition to their great powers.

You must not think any part of this lecture inconsistent with my attachment, well known to you, to the valuable parts of the constitution which limit the prerogatives of the Crown. Consistent with my aversion to inordinate regal power is my still greater dislike and distrust of inordinate democratic power.

LECTURE LVI.

1. *Common Law.*
2. *Customs and Usages.*
3. *Statute Law.*
4. *Kingly Power.*
5. *Parliament.*
6. *Customs of Parliament.*
7. *Separate Privileges of each House.*
8. *House of Commons. Disputed Elections.*
9. *House of Lords. Life Peerages.*

My anticipations, expressed at the close of my first series of these lectures, are not verified. Instead of making the sudden transition, then spoken of, I find myself gliding from one most important branch to other parts of constitutional law.

Critics teach that every literary work, if it has not, ought to have, its one idea; and, moreover, if that idea is not apparent, it ought to be easily discoverable. Upon this point I do not leave you in the dark. However desultory you may have thought these lectures, they have not, I trust, failed to impress upon your minds the principle which I wish to be considered to pervade them, giving them, as I have before remarked, a sort of unity, to which they might otherwise have no pretence. The principle I mean is that insisted on in my first lecture, that the laws of England consist of the ancient customs and usages of the people of England.

To this principle, I repeat, our written laws themselves may be referred; inasmuch as they derive their force from the ancient custom and usage of the people to obey acts of parliament.

To this principle may also be referred the power of the Crown; inasmuch as it is an ancient custom and usage to be governed by a monarch, a King or a Queen, whose title to sovereign power, and to the allegiance of the people, is transmitted by inheritance, according to the course of the common law in respect of private inheritances, adapted to

the circumstance of the powers, rights, and duties of a monarch not being divisible. You remember my attempt to illustrate, by each other, the descent of the Crown, and the descent of private inheritances.

But there is no known limit to the legislative power of parliament. It has been exercised by changing the succession of the Crown itself; and so it happens, that the title of our present sovereign lady, the Queen, is derived from two blended sources: the common law rule, making the Crown hereditary, and the Act of Settlement making the Princess Sophia of Hanover the source from which the descent is traced.

It is an ancient usage and custom, and therefore part of the common law, that the parliament, the supreme legislature of the kingdom, consists of three branches; the King or Queen, the Lords, the Commons; and that the separate assent of each is essential to the validity of any new law. The customs of parliament are themselves an important branch of the common law. In Blackstone's interesting and instructive chapter entitled, "Of the Parliament," you read: "The high court of parliament hath "its own peculiar law, called the *lex et consuetudo Par-* "*liamenti;* a law which Sir Edward Coke observes is *ab* "*omnibus quærenda, a multis ignorata, a paucis cognita.* "It will not therefore be expected that we should enter "into the examination of this law with any degree of "minuteness; since, as the same learned author assures "us, it is much better to be learned out of the rolls of "parliament, and other records, and by precedents, and "continual experience, than can be expressed by any one "man. It will be sufficient to observe that the whole of "the law and custom of parliament has its original from "this one maxim: that whatever matter arises concerning "either house of parliament ought to be examined, dis-"cussed and adjudged in that house to which it relates, "and not elsewhere." You perceive the bearing of this on the subject of the latter part of the last lecture.

Upon this last-mentioned principle the House of Commons has always persisted in the mischievous practice of trying disputed elections before committees, consisting formerly of all the members, and now of selected members of that house. This mode of trial has been changed, regulated and improved by acts of parliament. Nevertheless, it has never obtained the confidence of the community; and an opinion prevails with some in favour of a proposal, that the Commons should give up this privilege, and permit disputed elections to be tried before one of the ordinary impartial tribunals sitting in Westminster Hall.

In the exercise of a similar privilege the House of Lords, some years since, passed a resolution by which they effectually denied a seat in the house to Lord Wensleydale, a peer, whose patent limited his peerage to himself only for his life. By this resolution, acquiesced in by the Crown, the Lords asserted, as a principle, that, to confer a title to a seat in their house, a patent must create an hereditary peerage. In consequence of this resolution a patent was granted, giving the dignity of a peerage to Lord Wensleydale and the heirs male of his body.

The majority of the Lords, who voted for the resolution, must have disregarded ancient precedents and mere legal reasoning, and must have decided according to their own views of expediency. In this case the Lords had a direct interest in resisting the royal prerogative, inasmuch as any ministry desiring to increase its influence in the upper house by creating new peers would more readily find talented men willing to accept life peerages, than properly qualified men willing to accept hereditary peerages. A man may possess an estate or a life income adequate to the dignity of a peerage enjoyed by him for life; but not an estate which he could settle on his eldest son and his descendants to the exclusion of his other children. Now it is manifest that any considerable addition to the number of the peers tends to diminish the value of every peerage both in dignity and power. The interest of the Lords in

the question raised, as to the validity of a claim by a peer for life to a seat in their house, justifies an opinion that it would have been more satisfactory, if there had been a judicial tribunal invested with the power to decide the question.

It might be better if all claims to seats in either house of parliament could be made subjects of the jurisdiction of one of the superior courts of common law. For this purpose an act of parliament would be requisite. From time to time many parliamentary usages and privileges have been regulated, restrained or repealed by acts of parliament. Some, by disuse, have become obsolete.

LECTURE LVII.

1. *Parliament. Money Bills.*
2. *Commons.*
3. *Lords.*
4. *Supplies.*
5. *Taxation.*
6. *Land Tax.*
7. *Paper Duty.*
8. *Precedents.*
9. *Parliament. Act.*
10. *Express Assent of each Branch of the Legislature.*
11. *The Commons grant, the Lords assent.*
12. *Bill of Supply. Form.*
13. *Grievances before Supplies.*
14. *Money Clauses.*
15. *Penalties.*
16. *Fees.*

History makes Englishmen regard as one of the most important of the customs of parliament, the usage which maintains the privilege of the Commons, that is, of the people at large, that all supplies of money to be raised by taxation shall begin by a vote of the House of Commons. The privilege is by some attributed to the fact of the people, the great body of taxpayers, being represented in that house; by some to the probability that the Lords may be too much under the influence of the Crown to be entrusted with the power of voting supplies.

A supply having been voted by the House of Commons, effect is given to it by a bill, which, beginning there, and receiving the consent of the House of Lords, and the assent of the Crown, becomes an act of parliament.

Another privilege of the Commons is, that a money bill cannot be altered or amended by the Lords. The only choice the Lords have is between consent and rejection. Of this a remarkable instance occurred in 1692. In that year an act was passed for raising money by means of a land-tax, the very land-tax which, as then assessed, is paid to this day. While the bill was passing through parliament, the Lords inserted a clause, enacting, that the estates of peers should be valued by twenty of their own

order, instead of the commissioners named in the bill, being the principal gentlemen of every county. This clause, for which there were precedents, was rejected by the Commons. After a conference between the two houses, the Commons returned the bill to the Lords, with a brief intimation, that they were not to presume to alter laws relating to money. After another conference, the Lords waived what they protested to be their right to amend money bills. Read again Macaulay's account of this transaction.

In the year in which I am writing, 1860, the House of Lords rejected a bill sent to them by the Commons for repealing the ancient excise duty on paper. Assertions were made by some persons, that by this rejection the Lords infringed on a constitutional principle, that the taxation of the people is to be regulated by the representatives of the people. There is no such principle implied in the privilege of the Commons, that all money bills shall begin in the House of Commons, and shall not be altered in the House of Lords. That privilege is quite consistent with that which is the true rule; that a tax cannot be imposed or repealed, except by an act of parliament, originating in a vote of the House of Commons. Now the assent of the House of Lords is as essential to an act of parliament as the assent of the House of Commons. There is no distinction in this respect between an act imposing or repealing a tax, and any other law; and there are no legitimate means of forcing the Lords to give their consent, otherwise than according to their own opinions. It is enough that they cannot alter a money bill; it is for them to choose between assent and rejection.

In consequence of the rejection by the Lords of the bill for the repeal of the paper duty, the Commons appointed a committee to search for precedents. The committee made a report, setting forth many precedents serving to establish the privileges of the Commons in respect of taxation, and a few instances of the exercise by the Lords of their right to reject money bills, and not one precedent inconsistent

with that right. The pervading principle is, that the Commons in the first instance grant, and the Lords then assent to, supplies to the Crown.

Of this long report, which must henceforth be the text book of this part of our law, I shall, in this lecture, make use of those portions only in which are related the events of the years 1407 and 1628.

In the year 1407, the ninth year of the reign of Henry the fourth, at a parliament holden in the abbey of Gloucester, the Commons represented to the King that they were greatly disturbed by the King sending to them, for their consideration, a vote of the Lords in respect of an aid, deemed by the Lords proper to be voted to the King. The Commons affirmed this to be in great prejudice and derogation of their liberties. It was then solemnly settled and recorded in parliament, that neither the Lords separately, nor the Commons separately, shall make any report to the King, of any grant granted by the Commons and assented to by the Lords, until the Lords and Commons are of one assent and of one accord; and then, in manner and form accustomed by the mouth of the Speaker of the Commons. This great precedent is implicitly followed to this day. The terms grant and assent express sufficiently the distinct functions of the two houses, of one to propose supplies, of the other to assent or not to assent.

In the year 1628, early in the great struggle between privilege and prerogative, the form of the preamble of a bill of supply was settled by a committee of the Commons, consisting of Sir Edward Coke, Mr. Glanville, Mr. Selden and others, and, being excepted to by the Lords, was persisted in by the Commons. The form so settled was this: "Most gracious Sovereign, we your Majesty's "most faithful Commons have given and granted to your "Majesty."

The tenor of the form settled in 1628, expressing the fact of the Commons granting supplies, is observed to the present time, though there are often deviations from the

very words then selected and arranged. The preamble of the act of parliament imposing, in April, 1860, an income tax of ten pence in the pound, is thus worded: "Most gracious Sovereign,—We, your Majesty's most "dutiful and loyal subjects, the Commons of the United "Kingdom of Great Britain and Ireland in parliament "assembled, towards raising the necessary supplies to "defray your Majesty's public expenses, and making an "addition to the public revenue, have freely resolved to "grant unto your Majesty the several rates and duties "hereinafter mentioned; and do therefore most humbly "beseech your Majesty that it may be enacted; and be it "enacted by the Queen's most excellent Majesty, by and "with the advice and consent of the Lords spiritual and "temporal, and Commons, in this present parliament "assembled, and by the authority of the same, as follows." It is impossible to suppose a precedent more precise or more decisive to the effect that, though taxation must begin by a resolution of the Commons, it must have the express sanction of each of the three distinct branches of the legislature.

In July, 1860, the House of Commons, after a debate of two nights on the report of their committee to search for precedents, passed three vague resolutions, in which, by means of a little study, one perceives combined an assertion and an admission of one constitutional truth: that a bill relating to taxation, or to any of the details of taxation, must begin in the House of Commons, and may be rejected by the Lords.

Doubtless the expressed opinion of the Commons, on any question of taxation, supplies an argument which ought to have great weight in the deliberations of the other house, but the Lords may sometimes think this argument outweighed by others, and then it is their right and their duty to disregard it. If they neglect this duty, they deprive the community of one of the safeguards against hasty and unwise legislation, and unwise taxation: the de-

liberate consideration of every proposed new law, and of every proposed tax, by each of three differently constituted and independent estates of the realm.

Keeping in view the fact that it is not a mere veto by means of which either branch of the legislature may reject a proposed law sanctioned by the other two, one wonders that the power of the House of Lords to reject a money bill could ever have been doubted. The positively and separately expressed assent of every one of the three branches is indispensable. A power to signify a veto might be lost by disuse. The frequent repetition of an express assent keeps alive the power to give or withhold it. Though the royal assent has not been for more than a century refused to a bill, having passed through both houses of parliament, the power to withhold it is as undoubted as ever. Disuse has not impaired it, and occasions may possibly arise for the exercise of it.

To the maintenance in former times of the great point of constitutional law, that the people cannot be taxed without the consent of parliament, we are in a great measure indebted for the preservation of the country from despotic power. Of nearly equal value is the privilege of the Commons, that a supply of money to the Crown must begin by a vote of their house. It cannot be too carefully guarded. It adds force to the constitutional watchword, —grievances before supplies.

Though there is never now reason for thinking this privilege in danger, great care is, in point of fact, always taken to avoid precedents which might impair it. After many struggles by the Lords against it, their acquiescence in this privilege has become habitual and complete. Those who manage the details of the business of their house, the Lord Chancellor, and the chairman of committees, are careful that any bill beginning there shall not, when sent down to the Commons, contain what is called a money clause: any clause which can be construed as imposing any payment in any way resembling a tax. A clause of that sort

would certainly be rejected by the House of Commons, as a breach of privilege. The rule is applied not only to taxes for the general purposes of the government, but to taxes for limited purposes, such as turnpike tolls, and special purposes, such as rates for the improvement of a town, and even, as some think unreasonably, to penalties and fines for offences.

It is a standing order of the House of Commons made in 1831, that if, by any bill sent down by the House of Lords to the Commons for their concurrence, any pecuniary penalty or forfeiture is imposed, varied or taken away, the Speaker shall report to the house, whether the object is to impose, vary or take away any pecuniary charge or burden, or whether the same relates only to the punishment or prevention of offences, and the house shall thereupon determine whether it may be expedient, in the particular case, to insist on the exercise of its privilege to originate all provisions respecting pecuniary penalties or forfeitures.

Another standing order of the House of Commons made in 1849, declares to the effect that with respect to any bill brought from the Lords, whereby any pecuniary penalty, forfeiture or fee shall be authorized, imposed, appropriated, regulated, varied or extinguished, the house will not insist on its ancient and undoubted privileges: firstly, when the object is to secure the execution of the act, or the punishment or prevention of offences; secondly, when fees are imposed in respect of benefit taken or service rendered under the act, and in order to the execution of the act, and are not payable into the Treasury or Exchequer, or in aid of the public revenue, and do not form the ground of public accounting; thirdly, when the bill is a private local or personal bill.

LECTURE LVIII.

1. *King.*
2. *Powers in respect of Parliament.*
3. *Chief Magistrate.*
4. *Executive Powers.*
5. *Prerogatives.*
6. *Ministers.*
7. *Responsibility.*
8. *High Crimes and Misdemeanors.*
9. *Impeachment.*
10. *High Court of Parliament.*
11. *Court of the Lord High Steward.*
12. *Peers.*
13. *Peers of the Realm tried.*

As from the common law the king derives his power as the head of the legislature, involving the power to convoke, to prorogue, and to dissolve it, and the necessity of his assent to its acts, so from the common law he derives his executive power as the chief magistrate of the realm; it being an ancient custom and usage of the people to obey the king, as their chief magistrate. By the king are appointed the judges, by whom justice is administered, and the sheriffs, and other magistrates by whom the law is enforced and the public peace preserved. The king is the commander-in-chief of the land and sea forces of the nation. He negotiates with other states on questions in which the country is concerned. He appoints ambassadors to foreign parts; enters into treaties, declares war and makes peace. He confers peerages, and other distinctions of rank. By his officers the public revenue is collected and expended.

All these and many other prerogatives and functions, which I cannot, in a rapid summary, attempt to enumerate, the king derives from the common law, consisting of the ancient customs and usages of the people with reference to the subject-matters of those prerogatives and functions. Many of them have been modified by acts of parliament; all, according to the now well-established usage, are exercised by the sovereign with the advice and assistance of ministers, who are responsible for the advice they give,

and for their own conduct in the transaction of public affairs. A delinquent minister, or, indeed, any person accused of a high crime and misdemeanor, may, as you know, be brought to justice by means of an impeachment, presented by the House of Commons, as the grand inquest of the realm, to the House of Lords, the tribunal before which the impeachment is tried. The prosecution is conducted by a committee of the House of Commons, the members of the committee being called managers. On the occasion of every such trial the House of Lords is properly called the High Court of Parliament.

Having diligently read history, you are well acquainted with the functions of the House of Lords as a court of justice for the trial of peers and peeresses for treason or felony, or misprision (concealment) of either. This jurisdiction originates in the ancient custom and usage that an accused person is to be tried by his equals:—pares, peers. In England there are but two orders of men, the peers of the realm and the commons. The sons of peers are commoners. They are noble only by courtesy. We, fortunately, have not, as some countries have, a third order, that of slaves or serfs, subjects of property. Thus a peer of the realm is tried by his peers, the members of the House of Lords. A commoner is tried by twelve of his peers, a jury. If you ask how it is that this privilege of the peers is confined to treason, felony, and misprision of either, and that they do not enjoy it when tried for misdemeanors, I am not ready with an answer. There are misdemeanors of greater enormity than many felonies. If Blackstone's suggestion of a reason for the privilege is right, that the great are always obnoxious to popular envy, and, were they judged by the people, they might be in danger from the prejudice of their judges, the reason seems as applicable to a trial for an aggravated misdemeanor, especially if of an infamous character, perjury for instance, as to any trial for felony. Accused of a misdemeanor, a commoner is tried by his peers: a peer is not so tried; he is tried by a jury of commoners.

For the trial of a peer, the course of proceeding is this: —A bill having been preferred before an ordinary grand jury, and by them found true, the indictment is removed into the House of Lords, which, if parliament is then sitting, is called the High Court of Parliament; or, if it is not then sitting, the Court of the Lord High Steward. In either case the president is an officer appointed for the occasion, and called the Lord High Steward. There is this difference between the High Court of Parliament and the High Steward's Court, that in the former all the peers are judges both of law and fact, the high steward voting as one of them. But in the latter he is the sole judge of matters of law, the other lords only trying questions of fact, like a jury.

A still more important distinction exists with respect to trials of peers for felonies. Of the High Court of Parliament, all the peers of the realm who choose to attend are members; but of the High Steward's Court, those lords only are members who may be selected by him, and are summoned by his direction. As respects treason, this power, which might be made by the Crown and its officer, the lord high steward, the means of crushing noblemen hostile to the ministry for the time being, ceased after the end of the dynasty by which it was most likely to be abused. After the revolution an act of parliament (*a*) was passed, enacting that, upon every trial of a peer for treason or misprision of treason, all the peers who have a right to sit and vote in parliament shall be summoned at least twenty days before the trial; and every lord appearing shall vote in the trial. In the trial of a peer the decision is by the majority; but a majority cannot convict unless it consists of twelve peers at the least. The peers are not sworn, as jurymen are, to give a true verdict according to the evidence. At the close of the trial each peer separately votes "Guilty, upon my honor," or "Not guilty, upon my honor."

(*a*) 7 William III., chapter 77.

LECTURE LIX.

1. *Lords. House. Judicial Functions.*
2. *High Court of Parliament.*
3. *Appeals.*
4. *Chancery.*
5. *Equity.*
6. *Probate Court.*
7. *Divorce Court.*
8. *Court of Error.*
9. *Writ of Error.*
10. *Exchequer Chamber.*
11. *Queen's Bench.*
12. *Common Pleas.*
13. *Exchequer.*

The House of Lords has, by the common law, other judicial functions than those spoken of in the last lecture. It is, under the name of the High Court of Parliament, a court of ultimate appeal from the superior courts of common law, the King's Bench, called during the reign of a female sovereign the Queen's Bench, the Common Pleas, and the Exchequer, and from the High Court of Chancery, and from the Courts of Probate and Divorce.

The Chancery is the only now existing court of equity, of general jurisdiction over the whole kingdom. Of equity, in the peculiar sense in which English lawyers use the word, and of the Court of Chancery, I shall treat in future lectures. The Courts of Probate and Divorce I shall also reserve for future consideration. At this moment, I shall speak only of appeals from the superior common law courts.

As lawyers call that a criminal court in which criminals are tried, and its process criminal process, so, almost as absurdly, a court to which an appeal can be made is usually called a court of error. This strange phrase is meant to express that the function of the court is to correct the errors of other courts. The phrases criminal court, court of error, and other phrases of the sort, the use of which I shall not be able to avoid, may serve to remind you of the solecism "mad-doctors," meaning physicians who have the care of lunatics.

The process by which a cause is brought into a court of error is called a writ of error. It is issued in the name of the Queen out of the Court of Chancery; and it commands the transmission to the court of error of a transcript of the record and proceedings in which error is alleged to exist.

By the common law, as amended by a statute passed in the reign of Queen Elizabeth (*a*), the House of Lords was the court of error in respect of some classes of proceedings in the King's Bench; and a court called, from the place where it sat, the Exchequer Chamber, consisting of the judges of the Common Pleas and the barons of the Exchequer, was the court of error in respect of other classes of proceedings in that court.

By the common law, a cause in the Court of Common Pleas might be removed by writ of error into the King's Bench, and, after a decision there, by another writ of error, into the House of Lords.

Formerly, the Court of Exchequer, besides having its present jurisdictions as a court of common law and a court of revenue, to which jurisdictions I shall more especially refer in the course of these lectures, was a court of equity. Many years since, its jurisdiction in equity was taken from it by act of parliament. By the common law, a cause on the law side, as it was called to distinguish it from the equity side, of the Court of Exchequer, might be removed by a writ of error into a Court of Exchequer Chamber, consisting of the lord chancellor, the lord treasurer, and the judges of the King's Bench and Common Pleas; and thence, by writ of error, into the House of Lords.

By force of an act of parliament made in 1830 (*b*), "for "the more effectual administration of justice," the court of error, in respect of all the three superior courts of common law, is now the Court of Exchequer Chamber, consisting, in the case of an appeal from the King's Bench, of the judges of the Common Pleas and the barons of the Ex-

(*a*) 27 Elizabeth, chapter 8.

(*b*) 11 George IV. & 1 William IV., chapter 70, section 8.

chequer; in the case of an appeal from the Common Pleas, of the judges of the King's Bench and the barons of the Exchequer; and, in the case of an appeal from the Exchequer, of the judges of the other two courts.

Appeals can thus be made from the King's Bench to the Exchequer Chamber in criminal cases as well as in civil causes.

After a decision in the Exchequer Chamber an appeal lies, by means of another writ of error, to the House of Lords.

The Common Law Procedure Act of 1854, giving rights, not previously existing, to appeal against decisions of the superior courts not being the proper subjects of writs of error, makes the Exchequer Chamber and the House of Lords, successively, courts of appeal from the superior courts of common law, in the several cases in which it so gives, for the first time, rights of appeal.

Having now disposed of the judicial functions of the House of Lords, except as a court of appeal in equity, and except as the court of appeal from the Courts of Probate and Divorce, I shall, in my next lecture, proceed to consider those of the superior courts of common law.

LECTURE LX.

1. *Queen's Bench. Crimes.*
2. *Exchequer. Revenue.*
3. *Common Pleas. Real Actions.*
4. *Dower.*
5. *Quare impedit.*
6. *Common Law Courts. Jurisdiction co-ordinate.*
7. *Practice uniform.*
8. *Law Fictions.*
9. *Original Writs.*
10. *Writ of Summons.*
11. *Ejectment.*

The original and proper function of the Court of Queen's Bench is the administration of the laws for the repression of crimes, styled the criminal law. This jurisdiction it still retains, exclusively of the other two superior common law courts.

The original and proper function of the Court of Exchequer is the administration of the laws relating to the public revenue. This jurisdiction it still retains, exclusively of the other two courts.

The original and proper function of the Court of Common Pleas, which has been sometimes called the Common Bench, is the administration of justice between the subjects of the realm in respect of their property and their contracts, and all injuries not treated as crimes against the community. Aptly enough, this is said to be a civil jurisdiction (*civis, civilis*), as distinguished from a criminal jurisdiction. The name of each court serves to express well the nature of its original and proper jurisdiction.

Formerly, the Court of Common Pleas had exclusive jurisdiction in a variety of causes called real actions, relating to real property (landed property), all of which, except two, were abolished by an act of parliament made in 1833 (*a*).

(*a*) 3 & 4 William IV., chapter 27, section 36.

The clause by which real actions are put an end to contains a list of most of them; the names of many being curious specimens of ancient law jargon. Many of these actions had become obsolete. One good effect of the enactment is to relieve you and other law students from all occasion to burthen your minds with an enormous mass of what was called learning, the greater part being uninteresting to the degree of being repulsive.

The statute is entitled, "An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto." It carefully saves from the effect of its repealing clause the action of ejectment, which is now the only mode, except in the two cases just referred to, of asserting at law, as distinguished from equity, a disputed title to real property. An ejectment may be brought in any one of the three superior common law courts, at the option of the plaintiff.

Of the two real actions not abolished, one, called the writ of dower, is the remedy of a widow against the heir of her husband, or other person withholding her dower; the other, called a writ of *quare impedit*, is the remedy of the patron of an ecclesiastical benefice against a bishop or other person impeding his right of presentation.

With the exception of the two real actions just mentioned, and which are of rare occurrence, the three common law courts have now co-ordinate jurisdiction in all matters relating to property, to contracts, and to injuries not regarded as crimes.

From this jurisdiction, as will be explained in my lectures on equity, are excluded many wrongs and transactions in respect of which there can be found no remedy except in the Court of Chancery. From it are also excluded many causes of action, though not all, in respect of which the modern county courts have jurisdiction. This is also a subject I shall refer to hereafter.

I speak of the jurisdiction of the three courts as co-ordi-

nate, not only in the sense of there being no appeal from any one to either of the others separately, but also because any person intending to sue another for the recovery of property, or in respect of any breach of a contract, or in respect of any injury to his property or person, may select any one of the three in which to bring his action.

That the Queen's Bench and Exchequer have, in common with the Common Pleas, this extensive jurisdiction, originates in usurpation confirmed by usage. Until not many years ago the law of England, or rather its administration, was defaced by innumerable fictions, most of them idle inventions. Nearly all have been got rid of in the course of modern legislation. It would disturb your attention from the proper subjects of your present studies now to give instances of these absurdities. As to the fiction by means of which the Court of King's Bench usurped a general jurisdiction in civil causes, I may perhaps, in conversation, amuse you by relating its details. At best, it can be regarded now only as a trifle, interesting to a mere legal antiquarian, or as a puerile fiction—one of the many in which our predecessors in the practice of the law seem to have delighted.

The fiction to which the Court of Exchequer had recourse was more respectable. To bring a suit in the Court of Exchequer, the plaintiff suggested in his plaint that by reason of the defendant not paying him what he demanded, he, the plaintiff, was the less able to pay the king, in his exchequer, the money he owed him. By this suggestion, usually false, but that was thought of no consequence, it was pretended that an interest was given to the king in respect of his revenue; and the cause was made a subject for the interference of the Court of Exchequer. The writ by which the action was commenced, and in which the fiction was repeated, was called a *quo minus*.

Thus, by ancient usages and customs; ancient, though the origin of some of them is known; the superior common law

courts have a very extensive co-ordinate jurisdiction. This jurisdiction, in some respects usurped, extended by fresh usurpations, generally acquiesced in, and strengthened by usage, recognized and confirmed by writs called original writs, issuing in the king's name from the Court of Chancery, and having the effect of assigning particular suits to one or other of the three courts, has been so recognized, amended and regulated by many acts of parliament, that it may be said to exist now by direct legislative sanction.

Formerly, writs of the sort just mentioned, and which were called original writs, formed one of the most technical and unattractive of the subjects of a law student's reading, and of a lawyer's practice. They are now abolished, and the writs themselves, and the fictions which were main features of most of them, are now unworthy of your attention, unless when the form of one of them happens to enunciate a rule of law. Of this you remember an instance in my lecture on the liabilities of innkeepers.

Without information which you may never have a motive for acquiring, you can never know how comparatively simple in all respects have the process, pleadings and proceedings of all our courts of justice been made by modern legislation. A most complicated, dilatory and costly system, full of difficulties, snares and dangers, frequently leading the tribunals astray from real questions into questions of form and precedent, and often in other ways causing the miscarriage of justice, has, by successive changes, been converted into a system, not without faults, but which, comparatively with that which it has superseded, is simple, summary and inexpensive, and well calculated to bring to the consideration of the courts the true questions to be decided.

All actions at law, except the two surviving real actions, and except the action of ejectment, are called personal actions. By force of an act passed in 1852 (*a*) to amend

(*a*) 15 & 16 Victoria, chapter 76.

the process, practice and mode of pleading in the superior courts of common law, a writ, called a writ of summons, is the only writ for the commencement of any personal action in any one of those courts. This writ, forms of which are prescribed by the statute, is issued, in the name of the Queen from the court, and commands the defendant to cause an appearance to be entered in the court in an action at the suit of the plaintiff, and gives him notice that, in default of his doing so, the plaintiff may proceed to judgment and execution.

I am almost tempted by the ingenuity of the grotesque fictions which, until the year 1852, distinguished the action of ejectment, to speak now of the origin of this action: but really this abolished absurdity, fit, possibly, to be the subject of a casual conversation, is unworthy of a place in a lecture meant to be instructive. For a queer document, called a declaration in ejectment, which it was always most difficult to explain to a student, the statute I last referred to has substituted a writ, the form of which it prescribes, for the commencement of an action of ejectment in any one of the three courts. The import of the word "ejectment" serves to tell you that an action of ejectment is a proceeding in which a person asserts a right to the possession of real property in the possession of another. In this action, the right, if not disputed, is enforced in a summary way; and, if it is disputed, the question can be brought to trial and decision.

Thus it is that the writ, in its prescribed form, commands the appearance of the person in possession and of others entitled to defend the possession, or such of them as deny the alleged right, and informs them that, in default of their appearance, judgment will be signed, and they will be turned out of possession.

Originally, the practice of the courts varied very greatly; but is now made uniform by a succession of statutes enacted for that purpose. To the details of this practice I shall have future occasions to refer.

Of the little exclusive jurisdiction of the Common Pleas, in respect of two real actions, I have said enough. The revenue jurisdiction of the Exchequer is of too technical a nature to be fit for this part of these lectures. Besides the criminal jurisdiction of the Queen's Bench, there are several important branches of jurisprudence with which that court alone can deal, and to some of which, as well as to its criminal jurisdiction, I shall have occasions to refer in the next and in succeeding lectures.

LECTURE LXI.

1. *Queen's Bench. Criminal Jurisdiction.*
2. *Aula Regia.*
3. *Common Pleas.*
4. *Queen's Bench. Westminster.*
5. *Grand Jury.*
6. *Criminal Informations.*
7. *Ex Officio Informations.*

We will begin with the original criminal jurisdiction of the King's Bench, now the Queen's Bench.

In times now remote this and other courts, branches of a court called aula regia, followed the king's person and sat in any place, in any part of the kingdom, in which he happened to be. Whether, originally, the ordinary subjects of jurisprudence were so divided that three distinct courts were formed, all sitting in aulâ regiâ, one for criminal cases, one for revenue cases, and one for common pleas or suits between private persons, or whether, originally, one great court called aula regia had a general jurisdiction over all three subjects, I consider a question of some difficulty, fit for investigation by a skilful law antiquarian.

To remedy the inconvenience to private suitors of following the king's person to seek justice, it was one of the articles of Magna Charta that common pleas should not follow the king's court, but should be holden in some certain place. "Communia placita non sequantur curiam "nostram, sed teneantur in aliquo loco certo." In consequence of this article, the Court of Common Pleas has always since sat in Westminster Hall, the great hall of the king's palace at Westminster, the "certain place" probably intended, though not expressed, by the framers of the Great Charter. The Courts of King's Bench and Exchequer, though not mentioned in this article, have also for centuries sat in Westminster Hall; though such of the original writs mentioned in the last lecture as were returnable in the King's Bench, always required the appearance

of the defendant on a day named in the court before the king himself wheresoever he might then be in England. This was another law fiction, the king often being in other places in England than Westminster, and it never being the practice for him to administer justice in person.

At the beginning of every law term, a grand jury of the county of Middlesex, in which county Westminster is situate, is sworn and charged in the Queen's Bench. That court proceeds to the trial of any persons against whom indictments are presented by this grand jury for offences committed within their county. The trial is also by a Middlesex jury.

By reason of the frequent gaol deliveries in former times at the Old Bailey for the city of London and for the county of Middlesex, and by reason of the establishment, some years since, of the Central Criminal Court for London and Middlesex, and for some parts of three of the adjacent counties, bills are seldom presented to, and, consequently, indictments are seldom found by, the grand inquest sworn and charged in the Queen's Bench.

As, now that the Queen's Bench sits in Middlesex, it has an original jurisdiction in respect of offences committed in that county, so, I think, it would have a similar jurisdiction in respect of those committed in any other, in which it might at any time happen to sit; and that it would, in like manner, be attended by a grand inquest of that county.

Another branch of the original jurisdiction of the Queen's Bench is in respect of offences with which persons are charged by informations filed by the Attorney-General, or by an officer called the coroner and master of the Crown office. There cannot be any such information in respect of any treason or felony; for neither of which can a person be tried without an indictment found by a grand jury.

It is the practice for the Attorney-General to file informations only for great misdemeanors tending to disturb or endanger the government, and which it is necessary to repress by immediate prosecution and punishment. The power to file them has been less often exercised in our

time than in former times. It is a necessary part of the prerogative of the Crown, formerly greatly abused by the too frequent filing of informations for what were alleged to be seditious libels. Many similar publications are at this time overlooked as harmless; and many are the less mischievous by reason of their being overlooked. The great jealousy with which these ex officio informations, as they are called, have been regarded in parliament and by the people at large, has made our modern Attornies-General very averse to file them except in cases where their duty to do so is imperative. It may interest you to be now reminded that the trial of the seven bishops took place upon an ex officio information, alleging their petition to the king to be a seditious libel.

Informations filed by the coroner and master of the Crown office at the instigation of private prosecutors are of frequent occurrence. Formerly, this officer might, in his discretion, file informations ex officio; but, this power having been greatly abused in times preceding the revolution, an act of parliament was afterwards passed to the effect that informations shall not be filed by him without express direction by the court; and that the prosecutor shall give security for payment of the costs of the accused in the case of a failure of the prosecution.

The idea of a criminal information is so associated with that of a libel, that I think it right now to say in more express terms than before, that, though not often met with in practice, except in cases of libel, a criminal information, whether ex officio, or by leave of the court, may be filed for any crime punishable by means of an indictment and not amounting to treason or felony.

A criminal information being filed, process is issued to arrest the accused, who is either bailed or kept in prison to await the result. He pleads to the information. If he pleads not guilty, he is tried by a jury. If he pleads guilty, or if he is found guilty by the verdict of a jury, his punishment according to law is adjudged by the court.

LECTURE LXII.

1. *Queen's Bench. Superintending Court.*
2. *Assizes.*
3. *Commission of the Peace.*
4. *Nisi Prius.*
5. *Oyer and Terminer.*
6. *Gaol Delivery.*
7. *Quarter Sessions.*
8. *Criminal Information.*
9. *Central Criminal Court.*
10. *Admiralty Court.*
11. *Crimes at Sea.*
12. *Error. Writ.*
13. *Certiorari.*
14. *Trial. Place changed.*
15. *Prohibition.*
16. *Mandamus.*

A MOST important branch of the jurisdiction of the Queen's Bench is the superintendence of other courts of criminal jurisdiction. In treating of this power of the Queen's Bench, I shall take occasion to speak of the constitutions and powers of some of the courts in respect of which it is exercised.

Of several of these courts the jurisdiction is so local, or in other respects so confined, or is so impaired by lapse of time, that it would be a waste of time to say anything of them now. Those that I deem of sufficient importance to be at this time considered, are the courts of oyer and terminer and gaol delivery, and the courts of quarter sessions holden in every county; the former twice or oftener in every year; the latter usually four times.

And firstly, as to the courts of oyer and terminer and gaol delivery. You know the sensation made twice every year in a county town and its neighbourhood by the arrival of the judges of assize, as they are called. They derive the ordinary name of their office and of their court, the assizes, from the practice of sending them originating in the very ancient practice of commissioners or judges being sent into every county to take *assizes;* that is, to try certain real actions so called. Real actions being now abolished, there are now never any assizes to take, though the name is still retained. You will read in Blackstone's Com-

mentaries that the judges on circuit sit in every county by virtue of five commissions, namely, a commission of the peace, a commission of oyer and terminer, a commission of gaol delivery, a commission of assize, and a commission of nisi prius. Looking at the corresponding passage in Stephen's Commentaries, you will perceive that, since the abolition of real actions, he omits the commission of assize. From this I infer that the four other commissions only are now in use. Of these the commission of the peace resembles, I believe, the commission always existing in every county, and from which the ordinary justices of the peace derive their authority. The commission of nisi prius is that by virtue of which the circuit judges try questions of fact arising in civil causes pending in the superior common law courts. On this subject I may have future occasion to speak. The immediate objects of our attention are the courts of oyer and terminer and gaol delivery.

You know well that, England and Wales being divided into circuits, two of the judges of the superior courts of common law are, twice a year, assigned to each circuit. They are invested with adequate powers by separate commissions for each county. Sometimes it is thought right to issue a special commission to deliver a particular county gaol at a particular time, either generally or of persons charged with certain crimes. Of the former sort are the winter assizes now becoming usual in some of the larger counties, in addition to those which occur in the spring and summer. Of the other sort was the special commission issued some years since, after an insurrection which was defeated at Newport by the mayor and a small body of soldiers, to deliver the Monmouth county gaol of persons detained on charges arising out of the insurrection. Some of the persons tried were found guilty of high treason.

In a record printed at the end of the fourth volume of Blackstone's Commentaries, you may see a recital of the commission of oyer and terminer, specifying almost all the many crimes of which men are capable, and directing the judges

to inquire, hear and determine of these and all other misdeeds, offences and injuries whatsoever. It is sufficient for me to say that from that commission, and from the commission of gaol delivery, the circuit judges take an authority to try and adjudicate upon indictments presented by a grand jury sworn and charged by them, and upon indictments transmitted from former assizes by reason of the accused not having been in custody, or by reason of the absence of witnesses, or for some other good cause; or upon indictments transmitted from the court of quarter sessions in consequence of their happening to be found for crimes not within the jurisdiction of that court to try, though found by a grand jury sworn and charged by it; or in consequence of trials being adjourned from that court to the assizes, either by reason of their involving difficult questions, or by reason of the absence of witnesses, or for some other good cause.

The commission of oyer and terminer, giving in express terms the power to inquire, by the oaths of good and lawful men (the grand jury), and to hear and determine all treasons, felonies and misdemeanors, is the commission that enables the judges to try prisoners indicted at the same assizes; and the commission of gaol delivery is that which enables them to try indictments sent from former assizes or from the quarter sessions.

It sometimes happens that a criminal information is tried at the assizes; but this trial takes place under the commission of nisi prius, the cause being transmitted from the Queen's Bench in the same way as a civil action is sent by that court for trial. It is only with the jurisdiction to dispose of indictments that I am now concerned.

Formerly, sessions of oyer and terminer for the city of London and the county of Middlesex, and for the delivery of the gaol of Newgate, were holden at the Old Bailey eight times a year. In the year 1834, an act of parliament (*a*) established a court called the Central Criminal

(*a*) 4 & 5 William IV., chapter 36.

Court, the judges of which are the Lord Mayor of London, the Lord Chancellor, all the judges of the superior courts of common law, many other functionaries specified in the act, and any other persons named from time to time by the Crown. To this court is addressed from time to time a commission of oyer and terminer for the city of London and the county of Middlesex, and certain specified parts of Essex, Kent and Surrey. The act directs the court to sit at least twelve times in every year in the city of London or in its suburbs. In point of fact, it always sits at the Old Bailey, the judges of the superior courts taking the evidence and charging the jury in the more important trials; the recorder of London, the common serjeant of London, and the judge of the Sheriff's Court of London, in others. The grand jury is usually charged by the recorder.

The original jurisdiction of the circuit judges and of the judges of the Central Criminal Court acting as courts of oyer and terminer and gaol delivery, applies to all treasons, felonies and misdemeanors.

Before the creation of the Central Criminal Court, the High Court of Admiralty, which still exists for other purposes, had jurisdiction in respect of all crimes committed on the high seas, or on the sea coast beyond the limit of any county. This court had by the common law and by statute (*a*) a jurisdiction in respect of deaths and mayhems in ships in great rivers below the bridges, though within the limits of counties.

At common law, the High Court of Admiralty, the practice of which was for the most part according to the civil law, tried criminals without a jury. That any Englishman should be tried, not by his peers, but by a single judge, was always considered a grievance. By a statute made in the reign of Henry the Eighth (*b*), it was enacted in effect that every trial in the Court of Admiralty for a crime should

(*a*) 15 Richard II., chapter 3.
(*b*) 28 Henry VIII., chapter 18.

take place before commissioners, and a jury of twelve men upon an indictment found by a grand jury, the course of proceeding being according to the law of the land. The commissioners usually appointed were the Lord High Admiral, or his deputy and others: among them being two common law judges who, in practice, tried the prisoners.

The statute which established the Central Criminal Court (*a*), gave that court jurisdiction to inquire of, hear and determine offences committed on the high seas, or within the jurisdiction of the Admiralty of England, and to deliver the gaol of Newgate of prisoners committed for any offences alleged to have been so committed.

A statute passed in 1844 (*b*) has given a similar jurisdiction to the courts of oyer and terminer and gaol delivery of every county; so that persons charged with offences committed at sea are now commonly tried at the assizes for the county within which is situate the port at which they arrive.

The statute provides that nothing contained in it shall affect the jurisdiction of the Central Criminal Court, or restrain the issue of any special commission for the trial of persons charged with offences committed within the Admiralty jurisdiction.

In respect of courts of oyer and terminer and gaol delivery the Court of King's Bench is the immediate court of error. Of writs of error from that court to the Exchequer Chamber and thence to the House of Lords I have spoken in a former lecture.

As you have read in one of my lectures on contempts, an order of an inferior court of criminal jurisdiction, not being a judgment, and, therefore, not being the proper subject of a writ of error, may be removed by a writ called a certiorari into the Queen's Bench that its legality may be there questioned.

You know that a writ of error is a mode of appeal after

(*a*) 4 & 5 William IV., chapter 36, section 22.
(*b*) 7 & 8 Victoria, chapter 2.

judgment. Now it may happen to be right that before trial, and therefore before judgment, an indictment should be removed from an inferior court to the superintending court to be there disposed of. For this purpose a writ of certiorari may be issued commanding the court in which an indictment is found to send it to the Queen's Bench. A recent statute (*a*) provides to the effect that, except at the instance of the Attorney-General acting on behalf of the Crown, a certiorari shall not issue to remove an indictment, unless it be made to appear to the court from which the writ is to issue, that a fair and impartial trial of the case cannot be had in the court below, or that some question of law of more than usual difficulty and importance is likely to arise, or that for the satisfactory trial of the case a special jury, or a view of premises, in respect of which the indictment is preferred, may be required.

When an indictment is removed into the Court of Queen's Bench, it may be tried in that court or at the assizes for any county under the commission of Nisi Prius. If the ground for the issue of the certiorari is, that a fair trial cannot be had in the county in which the indictment is found, it is sent to be tried in some other county. Indeed, one of the chief uses of a writ of certiorari is the removal of trials from counties in which prejudices are prevalent against the accused into other counties.

To any inferior court, whether of criminal or civil jurisdiction, the Court of Queen's Bench may issue a writ of prohibition to stay a cause not within the jurisdiction of the inferior court, or a writ of mandamus to compel it to hear a cause in which it has jurisdiction.

(*a*) 16 & 17 Victoria, chapter 30, section 4.

LECTURE LXIII.

1. *Quarter Sessions.*
2. *Commission of the Peace.*
3. *Justices of the Peace.*
4. *Conservators of the Peace.*
5. *Jurisdiction of the Quarter Sessions.*
6. *Transportation.*
7. *Penal Servitude.*
8. *Definition by Exclusion.*
9. *Leet.*
10. *Municipal Reform Act.*
11. *Borough Commission of the Peace.*
12. *Borough Quarter Sessions.*
13. *Recorder.*
14. *Finance Business at Quarter Sessions.*

Of the inferior courts subject to the immediate jurisdiction of the Queen's Bench as a court of error, the court of quarter sessions is, next to the courts of oyer and terminer and gaol delivery, the most conspicuous. In every county there is always existing a commission under the great seal, called the commission of the peace, addressed to many of the principal gentry of the county, including usually the resident peers, and often some of the resident clergy, assigning them to keep the peace, and also to be justices to inquire by the oaths of good and lawful men, and to hear and determine of felonies and misdemeanors committed within the county. Thus from this commission, being a limited commission of oyer and terminer, the persons to whom it is addressed derive the ordinary title of their office, that of justices; and thus it is that they are members of a court called the general quarter sessions of the peace, at which they exercise their power to inquire, hear and determine: to inquire by means of a grand jury sworn before them; to hear and determine, that is to try, indictments found by the grand jury.

Out of quarter sessions also they have, as justices, many judicial powers, which they commonly exercise, and of which I shall have occasion to speak when I mention what are called petty sessions of the peace.

Another and more ancient title, now seldom used, of the

office of these justices of the peace is that of keepers or conservators of the peace. In this character, in addition to their duty of repressing riots and other breaches of the public peace, they have many functions, some ministerial, some judicial, and some of a mixed nature; the chief being the investigation of charges against persons brought before them, and the committal for trial of those against whom they think there is sufficient evidence to justify further investigation.

The commission of the peace, and the statute of Edward the Third (*a*), in pursuance of which it is issued, are so worded as to leave the jurisdiction of the quarter sessions, in respect of crimes, very undefined. In practice it never took cognizance of capital offences; crimes by which the punishment of death is incurred. Until the prevalence in very recent times of humane and truly wise principles as to the treatment of criminals, this exclusion in practice from the cognizance of the court of quarter sessions of capital crimes restrained its criminal jurisdiction to a few only of the lesser indictable offences. Still, even capital felonies, not being treasons, were within the terms of the statute and the commission; and, with regard to a variety of lesser crimes, doubts existed as to the extent of the jurisdiction which they conferred. These doubts have been removed by a statute passed in 1842 (*b*), to define the jurisdiction of the court of quarter sessions. From this jurisdiction the statute excludes treason, murder, and every capital felony; and any felony, when committed by a person not previously convicted of felony, punishable by transportation for life; and also eighteen classes of crimes:—

1. Misprision of treason.
2. Offences against the queen's title, prerogative, person, or government; or against either house of parliament.
3. Offences subject to the penalties of præmunire.

(*a*) 34 Edward III., chapter 1.
(*b*) 5 & 6 Victoria, chapter 38.

For the meaning of this head I must refer you to Blackstone's Commentaries. It is possible, though most unlikely, that against some wrongheaded person the penalties of præmunire may in our time be enforced.

4. Blasphemy, and offences against religion.
5. Administering or taking unlawful oaths.
6—7. Perjury, subornation of perjury, false affirmations or declarations, and subornation of the same.
8. Forgery.
9. Setting fire to crops of corn, grain, or pulse; or to any part of a wood, coppice, or plantation of trees; or to any heath, gorse, furze, or fern.

The meaning of this 9th head appears to be, that all the higher species of arson, such as burning houses, being excluded from the jurisdiction of the quarter sessions by reason of their being either capital felonies or punishable by transportation for life, the legislature now declares the lower species of arson to be also excluded.

10. Bigamy and offences against the laws relating to marriage.
11. Abduction of women and girls.
12. Endeavouring to conceal the birth of a child.
13. Offences against any of the laws relating to bankrupts and insolvents.
14. Blasphemous, seditious or defamatory libels.
15. Bribery.
16. Unlawful combinations and conspiracies: except conspiracies or combinations to commit any offence which the quarter sessions has jurisdiction to try when committed by one person.
17. Stealing or fraudulently taking, injuring, or destroying records or documents belonging to any court or relating to any proceeding therein.
18. Stealing or fraudulently destroying or concealing

wills or testamentary papers, or any writing, being or containing evidence of the title to any real property.

Since the passing of this statute the punishment of transportation has been abolished, and that of penal servitude substituted: so that a criminal may now be sentenced to penal servitude for the period for which he might before the change have been transported. The statute must now be read as if it contained the words "penal servitude" instead of the word transportation.

The jurisdiction of the quarter sessions may now be concisely defined to be a jurisdiction in respect of all crimes not being punishable by death or by transportation for life, and not being excepted by the statute of 1842. It is an eccentric, but in this instance an efficient, process, that of defining a thing by expressing what it is not. You see it may sometimes happen to be true that exclusio unius est expressio alterius.

It is remarkable that the grand jury charged by a court of quarter sessions may present for offences which that court has no jurisdiction to try. The second section of the act of parliament, of the first section of which we have just made an abstract, contains provisions for the removal to the assizes of indictments thus found at the quarter sessions. It is a piece of law, in practice obsolete, that at a court leet, the court which the sheriff ought to hold in every hundred not in the possession of a grantee of the Crown, and which many lords of hundreds and many lords of manors have, by prescription or by grant by the Crown, the privilege of holding, an indictment may be found for any felony or misdemeanor. An indictment so found should be certified to the assizes, to be there tried, a court leet not having any power to hear and determine. Some years since a steward of a court leet certified to the assizes at Gloucester an indictment found by the leet grand jury. The judge acknowledged the legality of the proceeding, but thought it best that a bill should also be preferred before the grand jury at the assizes.

Many cities and boroughs have in their charters clauses constituting certain persons, in most instances the mayor and aldermen, justices of the peace in and for the city or borough, and enabling them to hold a court of quarter sessions. In 1835 an act of parliament(*a*) was made for the regulation of municipal corporations. This statute, which is called the Municipal Reform Act, altered in most respects the municipal constitutions of numerous cities and boroughs enumerated in schedules, being all the most important in the kingdom except London, and comprising nearly all those which are represented in parliament. There are many obscure boroughs not affected by this statute. The first section repeals all parts of any law or charter inconsistent with any of the provisions of the statute.

Another section gives the Crown power to assign by commission persons to act as justices of the peace for each of the cities and boroughs enumerated in one schedule, and for every such of the boroughs, mentioned in another schedule, to which, upon petition of the town council, the Crown may be pleased to grant a commission of the peace.

Another section empowers the Crown, upon the petition of the town council, to grant to a city or borough, having a commission of the peace, a court of quarter sessions, of which the sole judge is a recorder appointed by the Crown.

The statute gives a court of quarter sessions so constituted cognizance of all crimes, offences, and matters cognizable by any court of quarter sessions of a county; except the power to make a county rate, and certain other administrative powers vested in the justices of the peace for a county, into the details of which I need not enter.

The right way for a student to make himself acquainted with the numerous administrative powers of a court of quarter sessions for a county is to attend, two or three times during his education, the quarter sessions at the time the court is transacting finance business, and exercising its powers in respect of the police, and of the county gaols, bridges, lunatic asylums and various other subjects.

(*a*) 5 & 6 William IV., chapter 76.

LECTURE LXIV.

1. *Error. Writ.*
2. *Quarter Sessions.*
3. *Burglary.*
4. *House-breaking.*
5. *Case reserved.*
6. *Indictment remitted to Assizes.*
7. *Appeals.*

The writ of error, by which a record at the assizes or quarter sessions may be removed into the Queen's Bench, enables that court to act as a court of appeal with reference to errors apparent on the face of the record. An instance of this might be an indictment presenting facts which if proved do not constitute a crime punishable by law. Another might be a sentence not warranted by law. I remember a case in which, by means of a writ of error, a judgment of the court of quarter sessions for Monmouthshire was quashed because the indictment charged the crime of burglary; an offence with regard to which the court of quarter sessions has no jurisdiction. Another error in the same record was, that the sentence of transportation was for a period shorter than the minimum period then required by law.

The crime of burglary is, by common law, that of breaking in the night into a dwelling-house with intent to commit a felony, or, by statute, that of breaking in the night out of a dwelling-house, having entered it with intent to commit a felony, or having committed a felony in it. For this purpose the night begins at nine in the evening and ends at six in the morning. The punishment for it is penal servitude for life or for not less than three years, or imprisonment with or without hard labour for not more than three years.

The circumstance that for burglary the punishment may be penal servitude for life deprives the quarter sessions of jurisdiction in respect of it. That court has jurisdiction in respect of the crime of house-breaking, not in the night,

with intent to commit a felony, the punishment for it being penal servitude for not more than fifteen years and not less than three years, or imprisonment with or without hard labour for not more than three years.

I now return to the proposition with which this lecture begins: a writ of error makes the court of error a court of appeal in respect of errors apparent on the record. Now it often happens that doubts or difficulties arise at a trial in respect of the admissibility of evidence or its application, and with reference to the question whether the facts proved are sufficient to justify a conviction. A doubt or difficulty of this sort arising during a trial cannot be made to appear on the face of the record, otherwise than by means of a special verdict—an unusual proceeding in a court of criminal jurisdiction. At the assizes the more usual practice has been, and still is, for the judge to reserve the point. The trial proceeds, and, if the prisoner is acquitted by the jury, the question reserved becomes unimportant. He cannot have been injured by the reception of evidence perhaps inadmissible, or by the opinion of the judge, perhaps wrong, that the facts proved constitute a crime. If the prisoner is convicted, the question reserved is considered by the judges of the common law courts at Westminster, sitting in the place called the Exchequer Chamber, though not constituting a court of exchequer chamber properly so called. According to the opinion they express, the person convicted is either sentenced to punishment or discharged. It was a defect in the law that the court of quarter sessions could not thus state a case for the opinion of the judges. This is remedied by a statute passed in the year 1848.

The commission of the peace contains a clause directing that if any question of difficulty arises at the quarter sessions, the case is to be adjourned to the assizes to be there disposed of. I have known this done in one instance: in that case the chairman of the quarter sessions stopped the trial, and directed the indictment to be transmitted to the assizes. At the assizes a jury was sworn and the trial pro-

ceeded as if the prisoner had not been arraigned at the sessions. In the course of the trial, the difficult question which had arisen at the sessions was discussed and reserved by the presiding judge; but, as the accused was acquitted by the jury, there was no occasion for his taking it before the other judges.

The court of quarter sessions possesses an extensive appellant jurisdiction in respect of many matters decided in the first instance by justices of the peace acting out of sessions. Of this appellant jurisdiction it will be more convenient to treat in the next lecture.

LECTURE LXV.

1. *Petty Sessions.*
2. *Criminal Justice Act.*
3. *Larcenies and Attempts to commit Larceny.*
4. *Previous Conviction.*
5. *Police Magistrate.*
6. *Stipendiary Magistrates.*
7. *Crime. Diminution.*
8. *Appeals to Quarter Sessions.*
9. *Case reserved.*
10. *Appeal from Justices of the Peace to a Superior Court of Common Law.*

THERE remains to be treated of another court which, though not bearing the name of a court of oyer and terminer, and though not having a commission so constituting it, is, in effect, a court of that character. For many purposes, some judicial, some administrative, every county has been long divided into districts, called petty-sessional divisions, in each of which the justices of the peace resident in or near it frequently hold courts called Petty Sessions. In 1855, the legislature availed itself of this tribunal to relieve the assizes and quarter sessions of the trial of many persons charged with comparatively trivial offences, thus saving to the country the expense of taking the witnesses to the county town and maintaining them there, to the prosecutor and witnesses the great inconvenience of being absent from their homes, and to the accused themselves long detention in prison while awaiting their trials. This important change was effected by an act of parliament called the Criminal Justice Act (*a*). In my analysis of the provisions of this statute you will perceive repeated a small portion of a former lecture.

The ninth section enacts, that every petty sessions shall, for the purposes of the act, be an open public court, and shall be the petty sessions holden for a petty-sessional division.

The first and second sections give, in many words, to

(*a*) 18 & 19 Victoria, chapter 126.

any justices of the peace assembled in petty sessions a jurisdiction which they may exercise, if they think fit, and if the accused consent to submit to it, to hear and determine charges of simple larceny of property, the value of which does not exceed five shillings, and charges of attempts to commit larceny from the person, or simple larceny. You will observe that the value of property attempted to be stolen and not stolen is immaterial for the purposes of this jurisdiction. Under these sections a sentence may be imprisonment with or without hard labour for not more than three calendar months.

The third section gives, in many words, to justices assembled in petty sessions a jurisdiction which they may exercise, if they think fit, when a person before them pleads guilty to a charge of simple larceny of property of greater value than five shillings, or of stealing from the person, or of larceny as a clerk or servant. You will observe that the value of property stolen from the person or stolen by a clerk or servant, is, for the purposes of this jurisdiction, immaterial. Under this section a sentence may be imprisonment with or without hard labour for not more than six calendar months.

From the jurisdiction given by the first and second sections is expressly excepted any case in which it appears to the justices that the offence is by reason of a previous conviction of the person charged, punishable by transportation or by penal servitude. There appears no such exception from the jurisdiction given by the third section in the graver cases which it provides for. This seems an instance of careless legislation.

The words, "any justices of the peace assembled," imply the necessity of the presence of two justices at least; but the sixteenth section gives to any one metropolitan police magistrate, or any one stipendiary magistrate, all the powers given by the act to justices in petty sessions. Stipendiary magistrates are rare. They are appointed in pursuance of

local acts of parliament for the government of very populous districts, such as Liverpool, Birmingham, and Brighton.

A trial at the petty sessions is of a very summary character. There is no grand inquest; there is no indictment; there is no jury. In some respects the proceedings are regulated by provisions contained in the statute.

In the county, with the affairs of which I am familiar, the average number of prisoners for trial at the quarter sessions, before the passing of the Criminal Justice Act of 1855, was one hundred and forty: since then it has diminished to forty. There is a similar change in other counties. The difference can be only partly accounted for by the cases disposed of in petty sessions. Perhaps the prompt punishments to which this law leads is one of the causes of the diminution of crime by which the difference just adverted to may be explained. I trust that another cause is the efficiency of the schools now everywhere provided for the poor.

Justices of the peace have, by force of many acts of parliament, a multitude of powers to convict, in a summary manner, persons offending against the provisions contained in those acts, and in very many instances the persons so convicted have a right of appeal to the quarter sessions. Indeed, in some instances of accused persons being acquitted, the prosecutor has a right of appeal. So also, when orders are made by justices in the administration of the poor laws, or of the laws relating to lunatics, or for stopping up or diverting highways, or with reference to some other subjects placed by statute within their jurisdiction, orders so made may in like manner be appealed against. In one instance in which the functions of the justices may be regarded as being almost as much administrative as judicial, that of granting licences to public houses, theatres, and places of public amusement, persons aggrieved by the grant or refusal of licences may appeal to the quarter sessions. I must postpone to some future opportunity the treatment of these very extensive sub-

jects: and this reference to them is now made lest these important parts of the jurisdiction of the quarter sessions, and that of justices out of sessions should seem to be now overlooked.

If, at the trial of an appeal at the quarter sessions, a question of law arises, deemed by the justices assembled to be a question of difficulty, they may, if they think fit, submit it to the consideration of the Court of Queen's Bench, by directing a case to be stated for that purpose. The practice is for the sessions to give a decision subject to a case which is prepared by the counsel for one of the parties, settled by the counsel for the other, and signed by both, or, if they differ, it is settled and signed by the chairman of the court. The order of the sessions and the case are removed by a writ of certiorari into the Queen's Bench, where the point reserved is argued and determined. The Court of Queen's Bench either confirms or quashes the order of the quarter sessions, according to the opinion of the judges upon the point of law thus submitted to them. There is no other method than this of obtaining a reversal of a decision of the quarter sessions in the case of an appeal; and that court may grant or refuse a case in its discretion. The law on this subject may be thus summed up: from a decision of the quarter sessions in a case in which that court is itself a court of appeal there is no appeal with reference to any question of fact; from such a decision there is, with reference to any question of law, an appeal with, and not without, the consent of the court itself.

In the year 1857 was introduced an entirely new system of appeal from the summary decisions of justices of the peace acting elsewhere than at the quarter sessions. An act of parliament made in that year (*a*) gives a right of direct appeal from justices out of sessions to either of the superior courts of common law.

In the abstract I shall now make of the chief provisions

(*a*) 20 & 21 Victoria, chapter 43.

contained in the statute I shall omit many parts, regulating in detail the practice in respect of appeals. For the present I think it sufficient to direct your attention to the general object and purport of the statute.

The second section provides to the effect, that after a determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way either party may, if dissatisfied with the determination as being erroneous in point of law, apply in writing within three days to the justice or justices to state and sign a case setting forth the facts and the grounds of the determination for the opinion of one of the superior courts of law named by the party applying. The same party is within three days to transmit to the court so named the case itself, and to the other party a copy of it.

The fourth section provides, that if the justice or justices are of opinion that the application is merely frivolous, but not otherwise, he or they may refuse to state a case.

The fifth section contains an enactment enabling the Court of Queen's Bench to compel a justice or justices to state a case.

The sixth section enacts, that the court to which the case is transmitted shall hear and determine the question or questions of law arising thereon, and shall reverse, affirm, or amend the determination or remit the matter to the justice or justices, with the opinion of the court, or may make such other order in relation to the matter, and may make such order as to costs, as to the court may seem fit, and all such orders shall be final and conclusive. A proviso is added, to the effect that no justice or justices shall be liable to pay costs in respect of any appeal under the statute.

The fourteenth section provides, that a person appealing under the statute is to be taken to abandon every right of appeal to the court of quarter sessions, which he might otherwise have had.

LECTURE LXVI.

1. *Juvenile Criminals.*
2. *Reformatories.*
3. *Parents' Responsibility.*
4. *Step-Parents.*

To the courts of petty sessions, in common with the courts of oyer and terminer and gaol delivery, and the courts of quarter sessions, is entrusted the administration of a new system of jurisprudence applicable to juvenile criminals. In former times, the imprisonment to which young offenders were subject, both before and after trial, bringing them into association with older criminals, commonly hardened them in the course of crime, and made them familiar with the practices of experienced malefactors. Afterwards, when gaols and prison discipline were improved, and the young could no longer be corrupted by the conversation of the old, the punishments to which juvenile offenders were sentenced were not long enough for their reform by means of discipline and religious and moral instruction. A few years since some philanthropists introduced a new system; that of removing juvenile criminals from gaols and penitentiaries to schools and reformatories. In these institutions efforts are made to improve their characters and alter their habits by a little school teaching, sufficient moral and religious instruction, and a great deal of discipline and hard work. The system works well; and is doubtless one of the causes of the diminution of crime. Not only are there fewer young offenders, but it is hoped that thus the main supply of future adult criminals may be cut off.

At first the managers of these schools could only receive inmates by the consent of themselves or by that of their parents; but the legislature has since, very wisely, enabled courts of justice to make confinement in a reformatory part of the sentence on a juvenile offender.

Of the several statutes on the subject of reformatories the first was passed in 1854 (*a*).

(*a*) 17 & 18 Victoria, chapter 86.

The first section contains provisions to the effect that a reformatory, certified by the secretary of state for the home department to be useful and efficient for its purpose, shall be held to be a reformatory school under the provisions of the act.

The second section enacts that, whenever any person under the age of sixteen years shall be convicted of any offence punishable by law, either upon an indictment or upon summary conviction, it shall be lawful for the court, judge, police magistrate, stipendiary magistrate, or any two or more justices of the peace, before or by whom such offender shall be convicted, in addition to the sentence then passed, to direct such offender to be sent, at the expiration of his punishment, to a reformatory school, to be there detained for a period not less than two years, and not exceeding five years. But according to a provision in this section, the offender must be also sentenced, by way of punishment, to a previous imprisonment for fourteen days at the least.

I mention this subject of reformatories in connection with that of the court of petty sessions, because, very commonly and very rightly the justices assembled in that court having juvenile offenders before them, instead of committing them for trial at the quarter sessions or assizes, sentence them under the Summary Jurisdiction Act to a short imprisonment in a penitentiary and a long detention in a reformatory. In many counties it rarely happens that, unless for a second or third offence, a person under sixteen years of age is tried for theft at the quarter sessions or assizes. Thus, a young thief is subjected from the period of his first being amenable to justice, to the process of reform.

The second statute relating to reformatories was passed in 1855 (*a*).

The second and third sections contain provisions for compelling the parent or step-parent of a juvenile offender

(*a*) 18 & 19 Victoria, chapter 87.

detained in a reformatory to pay, if of sufficient ability, for the support and maintenance of the offender, a sum not exceeding five shillings a week. This weekly payment is to be assessed by two justices of the peace upon the complaint of any person authorized by a secretary of state.

The liability thus imposed on a step-parent is remarkable. I presume that it is founded on a policy similar to that of the provisions, parts of the modern poor laws, by which a man marrying a woman who has children, legitimate or illegitimate, is burdened with the maintenance of them while under the age of sixteen years. However this may be, the wisdom of the law is evident, both as respects parents and step-parents. From either is thus withdrawn one motive for permitting or encouraging acts of theft on the part of a child; that of having him provided for in a reformatory, a motive by which a step-parent would be more likely than a parent to be influenced. The pecuniary liability consequent on a child being an inmate of a reformatory is a sort of penalty on a presumed want of due care in his education.

The third statute relating to reformatories was passed in 1856.

The fourth was passed in 1857. The four acts contain many regulations, into the details of which it is needless for me to enter further.

LECTURE LXVII.

1. *Justices of the Peace.*
2. *Commitment for Trial.*
3. *Constables.*
4. *Police Constables.*
5. *Hundred.*
6. *Chief Constables.*

THE most frequent duty of justices of the peace, partly administrative, partly judicial, is that of investigating charges against persons accused of crimes, and of committing them for trial, when the evidence appears to justify that course. Incidental to this is, since the Criminal Justice Act has been in force, the duty of selecting those cases deemed fit to be adjudicated on under that statute. In respect also of assaults, they have under different statutes discretionary powers to convict, and sentence or acquit, or to commit the accused persons for trial before another tribunal.

There are several ways in which persons accused of crimes are brought before justices of the peace. Of these I shall in my next lecture mention some of the most usual. In doing this I shall make frequent mention of an officer called a *constable*, being properly and originally the officer appointed for a township, his chief duties being to preserve the peace and to pursue and arrest criminals. In most instances a parish contains one township; its constable being called the parish constable. In many cases, with some of which you are familiar, a parish is divided into several townships, each having its own constable. I think it sufficiently accurate to say that, originally, the words township and constable were correlative, every township had a constable, and every constable ruled a township; every township representing a Saxon tithing.

Until within a few years constables were appointed at the courts leet for the hundreds or manors within which their townships were situate; but an act of parliament has transferred the duty of appointing them from the leet to the justices in petty sessions.

The explanation just given is preparatory to my stating the nature of the office of constable in its modern and more common aspect. Acts of parliament have established in every county a police force, every member of which is a constable for the county, and has all the powers, duties and responsibilities which any constable has by virtue of the common law or otherwise. When, in the next lecture, I speak of a constable taking a person into custody, you will understand that the constable thus acting may be a parish or town constable, but is more usually a police officer.

For each of the larger districts called hundreds, into which a county is divided, there is an officer called the high constable or bailiff of the hundred. His original and proper duties, like those of the constable of a township, concern the preservation of the peace, and the pursuit and arrest of offenders. In the performance of these duties, the persons who fill these ancient offices are, in practice, in a great measure superseded by reason of the more regular discharge of them by the modern county constables, or policemen, as they are called; but there is nothing in the statutes relating to the police to deprive other constables of their powers, or to relieve them from any of their duties. Some of the duties of high constables of hundreds relate to the collection of the county rates, and the preparation of the lists of persons liable to serve on juries, and they and the constables of townships have other duties than those I have mentioned.

LECTURE LXVIII.

According to the promise in my last lecture, I now proceed to speak of some of the usual ways of bringing before justices of the peace persons accused of crimes.

Any justice of the peace, any constable, and, indeed, any private person present when a felony is committed is bound by law to arrest the felon, and in the pursuit of him may break open doors, and even kill him if he cannot take him. A person who neglects this duty is liable to be fined and imprisoned, and if he is killed in the performance of it, the person killing him is guilty of murder.

When a felony has been committed, any person, though not a magistrate or constable, and though not present at the commission of the offence, may arrest a person of whose guilt there is reasonable suspicion; but he may not for this purpose break open doors, nor may he kill the suspected person if he cannot take him.

The law only permits a private person to arrest a suspected felon, without imposing upon him the duty of doing so. Indeed, to justify an arrest by a private person on a charge of felony, the person making the arrest must prove, firstly, that a felony has been actually committed, and

secondly, that there is reasonable ground to suspect the guilt of the person detained. Unless he can prove both these points, he is liable to an action for false imprisonment.

It often happens that a private person sends for a constable and gives a person in charge, as it is termed, that is, requires the constable to take him into custody on a charge of felony. A person who does this is as liable to an action for false imprisonment as if he had made the arrest himself, unless he can prove an actual felony committed and reasonable cause for suspecting the guilt of the person charged.

In the case of a private person desiring to prosecute a person for felony, not committed in his presence, the prudent course is to relate to a policeman the facts of the case, leaving him to exercise his own discretion as to arresting or not arresting the accused; for there is this difference between the position of a constable and that of a private person: a constable arresting a person on a reasonable suspicion of felony is justified, even if it cannot be afterwards proved that a felony has been actually committed; to justify the constable it is enough to prove a reasonable suspicion that a felony has been committed and a reasonable suspicion of the guilt of the person arrested. On such grounds it often happens, that a person is properly and lawfully detained by the police without any remedy, if the charge fails for want of proof of an actual felony, or even if the persons detained are proved to be innocent.

It is said, that even in the case of a felony having been actually committed a constable may not, in the pursuit, without a warrant, of a person of whose guilt there is reasonable suspicion, break open doors.

A private person has not authority to arrest a person for an assault or other breach of the peace not amounting to a felony.

A justice of the peace present at a breach of the peace may arrest, or command by word of mouth another person to arrest, the offender.

A constable present at a breach of the peace may arrest the offender; but, in the case of a breach of the peace at which he is not present, he may not without a written warrant from a justice of the peace arrest any person.

Of the unrepealed, but, in practice, obsolete powers of sheriffs and coroners to arrest felons, I have nothing more to say than that I do not remember an instance of their being exercised.

I refer you to Blackstone's Commentaries for a lively description of the hue and cry, in which constables and all other persons may be required to join for the pursuit and arrest of felons; fresh pursuit being thus made from town to town and from county to county. Modern usages and the efficiency of the police have rendered the law relating to the hue and cry, in point of practice, obsolete.

I have now stated the prompt measures, sanctioned by law, for bringing to justice persons guilty of crimes. There remains to be considered the legal process for effecting the same object, namely, a warrant.

Upon the receipt of direct information, whether on oath or not, and whether in writing or not, of a person having been guilty of an indictable crime, a justice of the peace may issue a summons requiring the accused person to appear before him; and, if the summons is not obeyed, a warrant may be issued for his arrest.

Upon a written information made on oath a justice may, if he thinks fit, in the first instance, and without a previous summons, issue a warrant to arrest a person charged with an indictable crime. Such warrants are frequently issued. In the execution of a warrant of this sort a constable may break open doors, and, if the alleged crime is a felony, may even kill the person named in the warrant, if he cannot take him.

You know the legal adage: a man's house is his castle. One meaning of it is, that, in the execution of process to arrest a person for debt, or in the execution of any process, other than in respect of his being charged with a crime, the

outer doors or windows of a dwelling-house may not be broken. Another meaning is, that even in the execution of process against a person on the ground of his being charged with a crime there ought to be, before outer doors or windows are broken, a notification of the business of the officer and a demand of admittance and a refusal of it. What may amount to such a notification, demand and refusal, may be a question depending upon the circumstances of any particular case.

The part of the law which treats as justifiable homicide the killing a felon by a person present at the felony, or by a person who has a warrant to arrest him, if he cannot be taken, is confined to cases of felony. To kill a person liable to be arrested, with or without process, for a misdemeanor or for debt, or any other cause than felony, though the person endeavouring to arrest him cannot take him, may be murder or manslaughter according to the circumstances.

In those parts of this lecture in which I have spoken of the powers of a justice of the peace, or of a constable, or of a private person, to arrest offenders without warrant, I have been guided by the common law. I shall now state the purport of some parts of the statute law, giving in plain language similar powers.

Of the several acts of parliament, passed in 1827 and 1828, usually called Peel's Acts, having for their object to reduce to a sort of code many parts of the law relating to crimes, one (*a*) is entitled "An Act for consolidating and amending the Laws in England relative to Larceny and other Offences connected therewith." This statute provides various punishments for various crimes, treating some as felonies, some as misdemeanors, and making some the subjects of summary convictions by justices of the peace.

The first part of the sixty-third section enacts: "that any "person found committing any offence punishable either "upon indictment or upon summary conviction, by virtue

(*a*) 7 & 8 George IV., chapter 29.

" of this act, except only the offence of angling in the day-
" time, may be immediately apprehended without a warrant,
" by any peace officer, or by the owner of the property on
" or with respect to which the offence shall be committed,
" or by his servant, or any person authorized by him, and
" forthwith taken before some neighbouring justice of the
" peace to be dealt with according to law."

Another part of the same section provides, that " any
" person to whom any property shall be offered to be sold,
" pawned or delivered, if he shall have reasonable cause
" to suspect that any such offence has been committed
" on or with respect to such property, is hereby autho-
" rized, and, if in his power, is required, to apprehend
" and forthwith to carry before a justice of the peace the
" party offering the same, together with such property, to
" be dealt with according to law."

This power is often exercised by pawnbrokers. In the trial of prisoners at the quarter sessions I have met with instances of respectable pawnbrokers being, thus, very efficient assistants of the police.

Dealers in marine stores have frequent opportunities of being useful in the same way. It might be well for magistrates to avail themselves of opportunities of drawing the attention of these dealers and others to the import of the word " required," as used in the statute, and of explaining to them that, for a wilful neglect of the duty thus imposed by an act of parliament, a person is liable to be indicted and fined, or imprisoned, or both fined and imprisoned.

If, without expressly providing a punishment for disobedience, a clause in a statute forbids or enjoins anything to be done, any wilful disobedience of the enactment is an indictable misdemeanor.

The authorities on the subject of the effect of a penalty enacted by a statute, for disobedience of an enactment contained in it, which disobedience might, but for the express enactment of the penalty, be an indictable misdemeanor, are so confused that I think it best, at this time, to instruct

you only as to the effect of an enactment forbidding or enjoining anything to be done without expressly providing any penalty; leaving you to investigate at a more advanced period of your studies a subject in the discussion of which there are usually difficulties to be encountered even by practitioners.

Another of Peel's Acts (*a*) is entitled: "An Act for consolidating and amending the Laws in England relative to Malicious Injuries to Property." It provides various punishments for various crimes, treating some of them as felonies, some of them as misdemeanors, and making some the subjects of summary convictions by justices of the peace.

The twenty-eighth section enacts "that any person found "committing any offence against this act, whether the same "be punishable upon indictment or upon summary convic- "tion, may be immediately apprehended without a warrant "by any peace officer, or the owner of the property injured, "or his servant, or any person authorized by him, and "forthwith taken before some neighbouring justice of the "peace to be dealt with according to law."

As by the common law any person present at the commission of a felony may arrest the offender, the chief practical effect of the enactments, to which I have just drawn your attention, giving power to the owner of property or his servant, or any person authorized by him, to arrest an offender in respect of property, is to give that power in cases of offences mentioned in the statute and not being felonies.

A statute passed in 1851 (*b*), contains this enactment: "it shall be lawful for any person whatsoever to apprehend "any person who shall be found committing any indictable "offence in the night and to convey him or deliver him to "some constable or other peace officer, in order to his being "conveyed as soon as conveniently may be before a justice "of the peace to be dealt with according to law."

(*a*) 7 & 8 George IV., chapter 30.
(*b*) 14 & 15 Victoria, chapter 19, s. 10.

As by the common law any person present at the commission of a felony, whether in the day or in the night, may arrest the offender, the chief practical effect of the enactment just quoted is to extend that power to cases of misdemeanors, and other offences not felonies, committed in the night.

There are innumerable statutes relating to particular subjects, game, for instance, which give powers to arrest, without warrant or other process, offenders against them. Of these statutes I have endeavoured to select those of the most general interest and application.

LECTURE LXIX.

1. *Search Warrants.* | 2. *Search without Warrant.*
3. *Precedents.*

The sixty-third section of Peel's Act relating to larceny, from which section I have, in the last lecture, made two extracts, provides to the effect, that if any credible witness shall prove upon oath before a justice of the peace a reasonable cause to suspect that any person has in his possession or on his premises any property on or with respect to which any offence, punishable by virtue of the act, shall have been committed, the justice may grant a warrant to search for such property, "as in the case of stolen goods."

The effect of this last enactment is to confirm and extend a part of the common law, an ancient usage or custom for justices of the peace to grant search warrants, giving authority to constables or others to enter and search dwelling-houses for stolen goods. The necessity for such a warrant to justify an entry into a man's dwelling-house without his consent or against his will originates in the respect due to the maxim: a man's house is his castle.

True it is that dwelling-houses are often searched by constables without warrants, but this is usually done by the consent, express or implied, of the masters of the houses. A man seldom refuses his consent to a search, because by so doing he may raise or add to a suspicion of his guilt.

You will in time highly appreciate the perusal and collection of forms and precedents as greatly facilitating the study of the law, and as firmly impressing on your minds useful points. Of this the form of a search warrant is a good instance. This is the form:—

County of Gloucester, to wit. } To the constable of Newland.

Whereas it appears to me John Fortescue Brickdale, Esq., one of the justices of our lady the Queen, assigned to keep the

peace in the said county by the information on oath of Edward Harrison, of Newland, in the county aforesaid, yeoman, that the following goods, to wit, six silver spoons, a silver watch, a silver chain and a silver watch key have within seven days last past, by some person or persons unknown, been feloniously taken, stolen and carried away out of the house of the said Edward Harrison, at Newland aforesaid, in the county aforesaid; and that the said Edward Harrison hath probable cause to suspect, and doth suspect, that the said goods, or part thereof, are concealed in the dwelling-house of John Smith, of Coleford, in the said county, labourer:

These are therefore, in the name of our said lady the Queen, to authorize and require you, with necessary and proper assistants, to enter in the daytime into the said dwelling-house of the said John Smith, at Coleford aforesaid, in the county aforesaid, and there diligently to search for the said goods; and if the same, or any part thereof, shall be found upon such search, that you bring the goods so found, and also the body of the said John Smith before me, or some other of the justices of our said lady the Queen, assigned to keep the peace in the county aforesaid, to be disposed of and dealt withal according to law.

Given under my hand and seal at Newland, in the said county, the twenty-ninth day of September, in the twenty-fourth year of the reign of Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, and in the year of our Lord 1860.

You see that a search warrant is one (it is the last to which I draw your attention) of the modes of bringing before a justice of the peace a person charged with a crime; and this is my chief reason for making a search warrant the subject of this lecture.

The use, in the sixty-third section of Peel's Larceny Act, of the words, "as in the case of stolen goods," leads me, as I shall explain at the beginning of my next lecture, directly from the subject of a search warrant to many provisions contained in that act, which I deem worthy of your especial attention.

LECTURE LXX.

1. *Search Warrant.*
2. *Larceny. Laws consolidated.*
3. *Property. Moveable and immoveable.*
4. *Goods and Chattels.*
5. *Land.*
6. *Buildings.*
7. *Fixtures, &c.*
8. *Minerals.*
9. *Trees, &c.*
10. *Plants, &c.*
11. *Fences, &c.*
12. *Trespass.*
13. *Larceny. Punishment.*

I HAVE spoken of the sixty-third section of Peel's Act of 1827, consolidating the laws relating to larceny, as confirming and extending the common law authority of justices of the peace to grant search warrants. By this I mean, that as that authority exists, irrespectively of the statute, in respect of stolen goods, that is, goods the subject of larceny properly so called, the enactment is, as to them, only confirmatory; but the statute applies, in many of its parts, to things in respect of which specified offences, made punishable by the statute, are committed, and not being according to the common law larcenies; and as to those things the statute creates an authority to grant search warrants.

To make this clear and, at the same time, to explain to you some curious parts of the common law, and some useful amendments of it, I shall now comment on the words of the statute "as in the case of stolen goods." In doing this I shall state the purport of many enactments contained in the statute of 1827, and which I shall designate Peel's Larceny Act; and I shall not refer to any of several previous (now repealed) statutes, having objects similar to those of some of the enactments I shall place before you. I shall treat the statute of 1827 as being, what it really is, the existing law for effecting those objects, and as being, to that extent, the existing substitute for the common law.

In English law, the word goods, or its equivalent word chattels, means only things which, being the subjects of property, are moveable, as distinguished from things which,

being the subjects of property, are immoveable, such as lands and buildings. According to the common law it is not larceny, theft, to deprive a man of any immoveable thing, or any part of any immoveable thing. Now, as the removal of a thing is, both in law and in common sense, essential to the idea of theft, there was certainly some reason in saying, that a field or a garden, or a castle or a cottage, could not be stolen. But the common law went further than this, and said, that everything annexed to, or growing on, an immoveable thing was a part of it, and, being part of it, was itself an immoveable thing and could not be stolen.

The principle, that everything annexed to, or growing on, an immoveable was a part of it, is the ground-work of a very extensive branch, or rather of several extensive branches, of law, involving many distinctions and difficulties, and called the law of fixtures, the study of which you will find essential. Our place is now to consider only that branch of the common law which treats of fixtures generally as not being, and those parts of the statute law which deal with some of them as being, subjects of theft.

According to the common law, then, a person who, though with the intention of stealing, dug and carried away coal or any other valuable mineral, or cut down and carried away a tree or part of a fence, or cut or gathered and took away any growing grass or corn, or removed any part of a building, for instance, lead, being part of the roof of a house, was not guilty of larceny. Any one of these things, previously severed from any land or building, was a chattel; and a person taking it, with the intention of stealing it, was by the common law guilty of the felony called larceny; but the combined acts, and greater moral guilt, of severing and taking it was only a trespass, for which the remedy was an action at law.

But if a person severed anything from any land or building, not his own, thereby reducing to the state of a chattel the thing severed, and if, at a subsequent and distinct

time, he fetched it away, with the intention of stealing it, he was guilty of larceny.

Thus, if a workman, repairing the roof of a house, ripped and secreted a part of the lead of the roof, and went at night and carried it off, he was a thief; if, without any interval of time, he ripped it and took it away, he was only a trespasser.

By the thirty-seventh section of Peel's Larceny Act a person who steals, or severs with intent to steal, any ore of any metal, or any lapis calaminaris, manganese, or mundick, or any wad, black cawke, or black lead, or any coal, or cannel coal, from any mine, bed, or vein is declared guilty of felony, and is made liable to be punished as in the case of simple larceny: that is, he may, in the present state of the law, be imprisoned for not more than two years with or without hard labour and with or without solitary confinement for specified periods, and, if a male, he may be once, twice or thrice publicly or privately whipped.

As to stone, chalk, marl, clay, gravel, sand, and other minerals not specified in the section, the effect of which is just stated, to sever and, at the same time, to steal any of them, however valuable, is still only a trespass, for which the remedy is an action at law.

The thirty-eighth section of Peel's Larceny Act, in many words of which I give the substance only, declares it to be a felony, and makes the offender liable to be punished as in the case of simple larceny, to steal or to cut, break, root up, or otherwise destroy, the whole or any part of any tree, sapling, or shrub, or any underwood, exceeding the value of one pound if growing in any park, pleasure ground, garden, orchard, or avenue, or any ground adjoining or belonging to any dwelling-house, or exceeding the value of five pounds if growing elsewhere.

The thirty-ninth section makes it an offence, of which a person may be convicted before a justice of the peace, to steal, or to cut, break, root up, or otherwise destroy, the whole or any part of any tree, sapling, or shrub, or any

underwood, wheresoever growing, of the value of one shilling at the least. The punishment is the forfeiture of a sum not exceeding five pounds and the value of the thing stolen or injured; but a person who, after being so convicted, is guilty of a similar offence, is to be imprisoned with hard labour for not more than twelve calendar months; and, if a male, the offender may be once or twice publicly or privately whipped. A person who, after being twice so convicted, is guilty of a similar offence is declared guilty of felony, and is made liable to be punished as in the case of simple larceny.

The fortieth section contains in respect of a person who steals, or cuts, breaks, or throws down, with intent to steal, any part of any live or dead fence, or any wooden post, pale, or rail, set up or used as a fence, or any stile or gate, or any part thereof respectively, provisions like those contained in the thirty-ninth section with reference to a tree, sapling, or shrub, or any underwood; except that the fortieth section does not make it necessary that the thing, in respect of which an offence is committed, is to be of any value, and except that it does not declare to be a felony any offence committed after two previous convictions.

The forty-second section makes it an offence, of which a person may be convicted before a justice of the peace, to steal, or to destroy or damage, with intent to steal, any plant, root, fruit or vegetable production, growing in any garden, orchard, nursery ground, hothouse, greenhouse or conservatory. The punishment is, at the discretion of the justice, either imprisonment with hard labour for not more than six calendar months, or the forfeiture of a sum not exceeding twenty pounds, and the value of the thing stolen or injured. A person who, after being so convicted, is guilty of a similar offence, is declared guilty of felony, and is made liable to be punished as in the case of simple larceny.

The forty-third section makes it an offence, of which a person may be convicted before a justice of the peace,

to steal, or to destroy or damage, with intent to steal, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing on any land, not being a garden, orchard or nursery ground. The punishment is, as to the justice shall seem meet, either imprisonment with or without hard labour for not more than one calendar month, or the forfeiture of a sum not exceeding twenty shillings and the value of the thing stolen or injured, and in default of payment, imprisonment for not more than one calendar month. A person who, after being so convicted, is guilty of a similar offence, is to be imprisoned with hard labour for not more than six calendar months, and may, if a male, be once or twice publicly or privately whipped.

The forty-fourth section enacts to the effect, that if any person shall steal or rip, cut or break with intent to steal any glass or woodwork belonging to any building or any metal, or any utensil or fixture, fixed in or to any building, or any thing made of metal fixed in any land being private property, or for a fence to any dwelling-house, garden or area, or in any square, street or other place dedicated to public use or ornament, every such offender shall be guilty of felony, and shall be liable to be punished, as in the case of simple larceny.

LECTURE LXXI.

1. *Trespass.*
2. *Misdemeanor.*
3. *Felony.*
4. *Benefit of Clergy.*

STUDYING the subjects of the preceding lecture, and of some succeeding lectures, it is well for you to bear in mind three propositions, which I have framed for your instruction, and which you may find of some use for other purposes in the course of your studies.

The first of the three propositions is that a trespass may be thus defined: a wrong done by force, however slight or however great.

The second proposition is that a trespass may be, and often is, so aggravated by circumstances that the law treats it as a misdemeanor: that is, an offence against the community, for which the offender may be prosecuted by indictment.

The third proposition is that a misdemeanor may be, and often is, so aggravated by circumstances that the law treats it as a felony: that is a crime, a conviction for which causes a forfeiture of the property of the criminal.

Every felony, if it is an act of force, is both a misdemeanor and a trespass. Of this a theft, or a murder, is an instance. Every misdemeanor, if it is an act of force, is a trespass. Of this an assault is an instance. Every unlawful forcible act is a trespass. Of this an unlawful intrusion into a man's house, or on his land is an instance.

Neither of my propositions has any reference to any wrong not done by force; for instance, slander, which, though a wrong for which an action is maintainable, is not a trespass, or a libel which is a misdemeanor, or a forgery, which is a felony. Plain as this point is on the face of the propositions, I think right to mention it expressly, lest anything I have said should lead you to suppose that every

wrong for which an action may be maintained is a trespass; or that every felony or misdemeanor is a trespass. At the same time, as my third proposition imports, it is correct to say that every felony is a misdemeanor: an aggravated misdemeanor.

It is usual to speak of a trespass, short of a misdemeanor, as a mere trespass. For a mere trespass the remedy is an action at law by the person injured against the trespasser.

For a misdemeanor the common law punishment is a fine or imprisonment, or both. By many statutes other punishments, transportation, or its modern substitute, penal servitude, for instance, are enacted for certain specified misdemeanors. Generally speaking, an action may be maintained by a person injured by means of a misdemeanor, against the wrongdoer, even while an indictment for it is pending.

If according to the common law any act is a felony, or if by any statute any act is declared to be a felony, the punishment is death, unless, as is now most commonly the case, some other punishment is enacted by statute.

The severity of the old common law, purporting to inflict on all felons the punishment of death, was mitigated by what was called benefit of clergy, with the nature of which history and miscellaneous reading have made most young persons acquainted. It has long been the practice to effect the same object by enacting specific punishments, short of death, for specified felonies.

For a felony the person injured by it cannot maintain an action, until, either by conviction or acquittal, the prosecution of the criminal, or alleged criminal, is determined.

Of the differences between a misdemeanor and a felony I have spoken before. It is incident to my mode of teaching, sometimes to place the same thing before you in different lights or for different purposes.

LECTURE LXXII.

1. *Larceny.*
2. *Realty.*
3. *Trees.*
4. *Growing Corn, &c.*
5. *Fixtures.*
6. *Minerals.*
7. *Writings.*
8. *Box containing Writings.*
9. *Villein.*
10. *Wardship.*
11. *Knight-Service.*
12. *Socage.*
13. *Copyhold Wardship.*

TREATING of the part of the common law spoken of in my seventieth lecture, Blackstone (*a*) says: "Of things that "adhere to the freehold, as corn, grass, trees, and the like, "or lead upon a house, no larceny could be committed by "the rules of the common law; but the severance of them "was, and in many things is still, merely a trespass: "which depended on a subtilty in the legal notions of our "ancestors. These things were part of the real estate; "and, therefore, while they continued so, could not by any "possibility be the subject of theft, being absolutely fixed "and immoveable." The commentator states the purport of some acts of parliament, in force in his time, and since repealed, for the punishment of persons stealing fixtures from buildings, trees and some other productions of land, and one metallic ore, namely, black lead. For those acts of parliament, parts of Peel's Larceny Act form the present substitute, treating, as shown in the seventieth lecture, some of these trespasses as offences in respect of which a justice of the peace may adjudicate punishment, others as misdemeanors, others as felonies.

You cannot but think it a still greater subtilty, if not an absurdity, in the legal notions of our ancestors, that deeds and other writings relating to the title to any land were regarded as part of the land, and, being part of a thing that is immoveable, could not be the subject of

(*a*) 4 Blackstone's Commentaries, 232.

larceny. To steal them was a mere trespass, for which the remedy was an action at law.

In what Blackstone calls the technical language of the law, deeds and writings relating to land are said to savour of the realty. With the land they descend from an owner of it to his heir, and they pass with the land from one owner to another by will, or by conveyance, or otherwise. That in this respect they are real, not personal, property is intelligible; but there seems no sense in attributing to moveable things, deeds and writings, a quality which a fixture or a growing tree has by reason of its being an immoveable thing.

It was also a part of the common law that a box or chest, in which were kept charters or writings relating to land, was a part of the realty, and though it happened to be itself of great separate value, to steal it was not larceny: it was a mere trespass, the remedy for which was an action at law. Coke, speaking of the box or chest, says (*a*): "It shall be of the same nature the charters be of; et omne "majus dignum trahit ad se minus." To this doctrine I shall have occasion to recur, when I proceed to state to you, soon, the purport of the enactments in Peel's Larceny Act, providing for the punishment of persons who steal writings relating to realty.

As one of the curiosities of the common law I transcribe from the page of Coke's Third Institute, from which I have just quoted a few words, this little paragraph:

"No larceny can be committed by taking and carrying "away of a ward or of a villein, because they are in the "realty."

You perceive, at once, that a villein was a part of his owner's real property; but you may not, without some explanation, understand how a man's ward can be said to be a part of his property.

Until an act of parliament, passed soon after the Resto-

(*a*) Coke's Third Institute, page 109.

ration (*a*), abolished the tenure by knight-service (chivalry or military service), by which until then many considerable estates were holden, if, upon the death of a tenant by knight-service, his heir, being a male, was under the age of twenty-one years, or being a female was under the age of fourteen years, the lord, as he was called, being the person of whom the lands were holden, had the wardship of the heir, until, if a male, he attained the age of twenty-one years, or until, if a female, she attained the age of sixteen years.

By virtue of this wardship the lord, who was then termed the guardian in chivalry, was entitled to the custody of the person of the heir, and maintained and educated him, and, moreover, had the custody of his lands, without accounting to him or to any one else for the profits, out of which he could provide the military service to which he would have been entitled from the heir, if of mature age. Of this wardship in chivalry, and of the oppressions and abuses which were its frequent consequences, you have read in history, and in poetry and romance consistent with history and with law.

The wardship was a part of the lord's real property, an incident to his own lordship or seignory. To one accustomed to the way in which the old lawyers could sometimes push a principle to strange consequences, it is hardly surprising to find a ward spoken of as a part of the lord's realty.

Again, by the common law, if upon the death of an owner of lands holden in socage, namely, freehold lands not being holden by knight-service, his heir was under the age of fourteen years, his guardian was his nearest of kin to whom the lands could not come by descent. This last qualification prevented the guardian being a person who had an interest in the death of the heir. This guardian in socage had the custody of the person and lands of the ward

(*a*) 12 Charles II., chapter 24.

until he attained the age of fourteen years, and was then bound to account to him for the profits of the land. The law regarded, for several purposes, the right of a guardian in socage to the custody of the person and land of the heir as an estate in the land. It was a part of his real property; and it is not to be doubted that Coke's doctrine, that a ward could not be the subject of larceny applied to a ward in socage.

Nearly all the lands in this country, not in the possession of the clergy, are now, as regards all freehold estates in them, holden in socage, and there are sometimes instances of children being wards in socage. I shall soon have occasion to speak more in detail of the nature of socage tenure.

If the heir of a copyholder is under age, the lord of the manor is his guardian; but, unlike a guardian in chivalry, he is bound to account to the heir, when of age, for the profits of the land. It is usual for the lord of the manor to grant a wardship of this sort to some friend of the heir. It is plain that such a wardship, as an incident to a manor, is of the nature of real property.

LECTURE LXXIII.

1. *Writings stolen.*
2. *Writings relating to Realty.*
3. *Box containing Writings.*
4. *Wills, &c. stolen or destroyed.*
5. *Records, &c. stolen or destroyed.*
6. *Parchment.*
7. *Misdemeanor made a Felony.*
8. *Felony declared a Misdemeanor.*
9. *Felony. Action.*
10. *Misdemeanor. Action.*
11. *Chose in Action.*
12. *Written Securities stolen.*
13. *Shares.*
14. *Savings Bank.*
15. *Warrant for Delivery of Goods.*
16. *Letters.*
17. *Manuscript Books.*
18. *Ward stolen.*
19. *Girl stolen.*
20. *Child stolen.*

The twenty-third section of Peel's Larceny Act (*a*) makes it a misdemeanor to steal any paper or parchment being evidence of the title to any real estate.

The section does not provide for the case of stealing a chest or box in which writings concerning the realty are kept, and it may perhaps be argued, that, on Coke's principle: omne majus dignum trahit ad se minus, to steal the chest or box has become a misdemeanor. On the other hand it may be argued that, as a penal statute is to be construed strictly, the statute not providing for the case of stealing the chest or box, to steal it may still be a mere trespass, for which the remedy is an action at law.

The twenty-second section of Peel's Larceny Act makes it a misdemeanor to steal, or, for any fraudulent purpose, to destroy or conceal, any will, codicil or other testamentary instrument, whether relating to real estate, or to personal estate, or to both.

The effect, shortly stated, of the twenty-first section of Peel's Larceny Act is to declare it to be a misdemeanor to

(*a*) 7 & 8 George IV., c. 29.

steal, or, for any fraudulent purpose, to take from its place of deposit, or from any person having its lawful custody, or unlawfully and maliciously to obliterate, injure or destroy, any record or document of or belonging to any court of record or any court of equity, or relating to any cause or matter begun, depending or terminated in any such court.

If a record of a court concerned land, the same common law rule applied to it as to any other writing being an evidence of title to real estate: it could not be the subject of larceny. This was the law, though a record, being the property of the court, would not be the property of the owner of the land, and therefore could hardly be regarded as if it were a part of the land.

If a record did not concern real estate, to steal it, or rather to steal the parchment on which it was written, being a thing of some value of itself, was by the common law a larceny.

As to a record concerning land the meaning of the statute is clear: to steal it is now a misdemeanor.

As to a record not concerning land, a question may be raised whether the enactment declaring the stealing it to be a misdemeanor deprives that offence of its character of a felony. The enactment, unless this is a consequence of it, seems not to effect its apparent object, so far as respects a record not relating to land, inasmuch as it is contrary to law to treat any felony as a mere misdemeanor. If a statute declares that to be a felony which was before a misdemeanor, the misdemeanor is said to merge in the felony; the criminal ought to be prosecuted for the greater offence, and may not be prosecuted for the less. It seems to be equally reasonable that, when the legislature declares that to be a misdemeanor which was before a felony, it should be taken to mean that the offence is to be in future only a misdemeanor; and that the criminal ought to be punished for the less offence, and is not to be prosecuted for the greater.

The punishment for any misdemeanor specified in either

of the three enactments, of which I have just stated the purport, is penal servitude for not more than seven, and not less than three, years, or fine or imprisonment, or both fine and imprisonment. The imprisonment may be with or without hard labour, and with or without periods of solitary confinement.

According to the purport of a part of the twenty-fourth section, nothing in the act contained, relating to any of the misdemeanors mentioned in the preceding part of the lecture, is to prevent, lessen or impeach any remedy at law or in equity which any person aggrieved by any such offence might otherwise have had. If the statute had declared the specified offences to be felonies, this provision would have had an important meaning; applied to any offence, declared to be a misdemeanor, it seems to be without effect. It says only that which the law says without it. With reference to this point I refer you to former lectures, in which I have spoken of the private remedy for a person wronged by a misdemeanor or by a felony.

I think I have not hitherto used the technical phrase "chose in action," meaning a thing to which a person is entitled, without having the possession of it. Thus, a debt, money due to one, is, of all choses in action, the most common. A chattel which a person withholds from the owner is a chose in action.

Blackstone (*a*) says: "bonds, bills, and notes, which "concern mere choses in action, were also, at the common "law, held not to be such goods whereof larceny might be "committed, being of no intrinsic value, and not importing "any property in possession of the person from whom "they were taken." By the words "no intrinsic value" the commentator means that the paper, on which a bond, or a bill of exchange, or a note of hand is written, is not of any appreciable value. Thus may be distinguished the case of stealing either of those instruments from that of stealing a record; the parchment on which a record is

(*a*) 4 Blackstone's Commentaries, 234.

written being, as waste parchment, a thing of some value. It is well known that many valuable parchment manuscripts have been stolen and used up in book-binding and for other purposes.

In the passage quoted from Blackstone's Commentaries, bonds, bills, and notes only are named; but they must be regarded as examples of written securities, being the titles, or evidences of the title, to choses in action infinite in number and in variety of species.

The fifth section of Peel's Larceny Act enacts to an effect which may be thus shortly stated: Any person who shall steal any security being the title, or evidence of the title, to any share or interest in any public stock or fund, or in any fund of any body corporate, company, or society, or to any deposit in any savings-bank, or shall steal any security for money, or any warrant or order for the delivery or transfer of any goods or valuable thing, shall be guilty of a felony, for which he may be punished in the same manner as if he had stolen any chattel of the same value as the share, interest, or deposit, the money due, or the goods or valuable thing.

There are acts of parliament providing for the severe punishment of persons who steal letters sent by the post. Making only this slight reference to those statutes I think I have said quite enough of those parts of modern legislation, by which is altered that part of the common law which treated as a mere trespass the stealing of writings, not having some intrinsic value, such as a parchment manuscript might have by reason of its material, or a manuscript book might have by reason of its contents.

I now recur to the doctrine that a ward, being a part of his guardian's real property, could not, according to the common law, be the subject of larceny. To some extent this is now modified by one of Peel's Acts passed in 1828, "for consolidating and amending the statutes in England "relative to offences against the person" (*a*).

The twentieth section enacts to the effect, that any

(*a*) 9 George IV., chapter 31.

person who shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor, and shall be liable to be punished by fine or imprisonment or both.

The twenty-first section enacts to the effect, that if any person shall maliciously, either by force or fraud, lead or take away, or decoy or entice away or detain, any child under the age of ten years, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, or shall with any such intent as aforesaid receive or harbour any such child, knowing the same to have been, by force or fraud, led, taken, enticed, decoyed or detained, every such offender, and every person counselling, aiding or abetting such offender, shall be guilty of felony. The punishment for any offence specified in this enactment is penal servitude for not more than seven years and not less than three years, or imprisonment with or without hard labor, for not more than two years, and, if a male, to be once, twice or thrice publicly or privately whipped.

LECTURE LXXIV.

1. *Animals stolen.*
2. *Domestic Animals serving for Food.*
3. *Oxen, &c.*
4. *Sheep.*
5. *Swine.*
6. *Domestic Poultry.*
7. *Wild Animals confined and serving for Food.*
8. *Deer.*
9. *Hares.*
10. *Rabbits.*
11. *Fish.*
12. *Pheasants.*
13. *Partridges.*
14. *Swans.*
15. *Pigeons.*
16. *Domestic Animals not serving for Food.*
17. *Horses.*
18. *Asses.*
19. *Mules.*
20. *Dogs.*
21. *Cats.*
22. *Ferrets.*
23. *Animals kept for Amusement.*
24. *Singing Birds, &c.*
25. *Parrots, Monkeys, &c.*

ACCORDING to the common law it was larceny to steal some animals; it was not larceny to steal others. In order to inform you of the interesting details of this part of our unwritten law, I now extract from Blackstone's Commentaries (*a*) five passages, arranging them in an order different from that in which they occur in the work itself. The summary thus expressed of the law relative to the stealing of animals is imperfect; but I think it clearer than any given by any other writer. The study of it will enable you to understand the effect of several sections of Peel's Larceny Act (*b*), providing for the punishment of persons by whom are stolen some of the animals, the stealing of which is, according to the common law, not larceny.

1. "Of all valuable domestic animals, as horses, and of "all animals domitæ naturæ, which serve for "food, as swine, sheep, poultry and the like, "larceny may be committed.

(*a*) 4 Blackstone's Commentaries, 234, 235.
(*b*) 7 & 8 George IV., chapter 29.

2. " Larceny cannot be committed of animals in which
" there is no property, either absolute or qualified,
" as of beasts that are feræ naturæ, and unre-
" claimed, such as deer, hares and conies, in a
" forest, chase or warren; fish, in an open river
" or pond; or wild fowls at their natural liberty.
3. " But if they are reclaimed or confined, and may
" serve for food, it is otherwise, even at common
" law: for of deer so enclosed in a park that they
" may be taken at pleasure, fish in a tank, and
" pheasants or partridges in a mew, larceny may
" be committed.
4. " It is also said that if swans be lawfully marked, it
" is felony to steal them, though at large in
" a public river; and that it is likewise felony to
" steal them, though unmarked, if in any private
" river or pond; otherwise it is only a trespass.
5. " As to those animals which do not serve for food,
" and which therefore the law holds to have no
" intrinsic value, as dogs of all sorts, and other
" creatures kept for whim and pleasure, though a
" man may have a bare property therein, and
" maintain a civil action for the loss of them, yet
" they are not of such estimation, as that the
" crime of stealing them amounts to larceny."

On these five passages I shall now comment, taking from their text a few words at a time, according to the method of some ancient law writers.

All valuable domestic animals.—It is not correct to say that of all valuable domestic animals larceny may, according to the common law, be committed; for a dog, though a valuable domestic animal, is not a subject of larceny. The fifth passage implies that dogs are only kept for whim and pleasure. There are many dogs, sheep-dogs, watch-dogs, and terriers, kept for the destruction of vermin, for instance, which are of real utility. It is difficult to deny

the utility of many sporting dogs, though many of them are kept only for pleasure.

As a matter of taste, you would have been better pleased if there had been an ancient usage and custom, a part of the common law of the land, treating with, at least, as great respect man's faithful companion and friend, the dog, as man's laborious slave, the horse.

I think the only valuable domestic animals, not serving for food, which could by the common law be subjects of larceny are the horse, the ass and the mule; and that to give accurate expression to the rule stated in the first of my extracts from Blackstone those three animals should be substituted for "all valuable domestic animals."

Prescribing a specific severe punishment for stealing a horse, a section in Peel's Larceny Act leaves the stealing of an ass, or of a mule, to be dealt with as a simple larceny, for which another section prescribes a less punishment.

Domitæ naturæ.—By animals domitæ naturæ are meant certain well-known species, or to speak with scientific precision, certain well-known varieties of certain species of animals whose natures have been changed by an indefinitely long association with mankind. They are said to be domitæ naturæ as distinguished from animals feræ naturæ. I think it better to speak of them as domestic animals.

Serve for food.—Of domestic animals, besides the horse, the ass, and the mule, those only which serve for food could, by the common law, be subjects of larceny. From the instances given of them by Blackstone is omitted the chief of them, the ox.

That they serve for food is the circumstance that gives to wild animals, confined, the value that makes them, by the common law, subjects of larceny.

Deer in a forest or chase.—The twenty-sixth section of Peel's Larceny Act enacts to the effect that, if any person shall, unlawfully and wilfully, course, hunt, snare or carry away, or kill or wound, or attempt to kill or wound, any

deer kept or being in the unenclosed part of any forest, chase or purlieu, he shall, on conviction before a justice of the peace, forfeit a sum of money not exceeding fifty pounds.

The same section enacts to the effect that, if any person, convicted of any of the offences just described, shall offend a second time by committing any of those offences, his second offence shall be a felony, and he shall be liable to be punished as in a case of simple larceny.

Deer in a park.—The same section also enacts to the effect that, if any person shall, in respect of any deer kept or being in the enclosed part of any forest, chase or purlieu, or in any enclosed land where deer shall be usually kept, commit any of the offences which I have just specified, he shall be guilty of felony, and shall be liable to be punished as in a case of simple larceny. This enactment may be regarded as confirming and extending the common law rule, treating as a felony the stealing of deer in a park.

For a definition of a forest, of a chase, and of a purlieu, I content myself with referring you to Manwood's Forest Law, especially the twentieth chapter. The subject is interesting to those who take pleasure in illustrating history and law, each by the other.

Hares and conies.—To steal a rabbit or a hare kept in a hutch, or otherwise confined, would be larceny by the common law.

Hares and conies in a warren.—The thirtieth section of Peel's Larceny Act makes it a misdemeanor, unlawfully and wilfully, in the night, to take or kill a hare or coney in any warren or ground lawfully used for the breeding or keeping of hares or conies. The section not providing any specific punishment for this offence, a person guilty of it is subject to the common law punishment for a misdemeanor, fine or imprisonment, or both.

The same section enacts to the effect that, if any person shall, unlawfully and wilfully, in the day, in any such warren

or ground as aforesaid, take or kill any hare or coney, or set or use any snare or engine for the taking of hares or conies, he shall, upon conviction before a justice of the peace, forfeit a sum of money not exceeding five pounds.

Pheasants and partridges in a mew.—Pigeons are more commonly kept in a confined or reclaimed state than pheasants or partridges. To steal from a pigeon-house or box pigeons either kept in close confinement, or, as is more usual, accustomed to fly away from the pigeon-house or box and return to it as their home, is, by the common law, a larceny.

The thirty-third section of Peel's Larceny Act enacts to the effect that, if any person shall unlawfully and wilfully kill, wound or take any house-dove or pigeon under such circumstances as shall not amount to larceny at common law, he shall, upon conviction before a justice of the peace, forfeit, besides the value of the bird, a sum of money not exceeding five pounds. This clause might apply to the case of a person stealing a pigeon when away from home.

Fish in an open river or pond.—The thirty-fourth section of Peel's Larceny Act enacts to the effect that, if any person shall unlawfully and wilfully take or destroy any fish in any water running through or being in any land adjoining or belonging to the dwelling-house of any person being the owner of the water or having a right of fishery therein, the offender shall be guilty of a misdemeanor.

The same section enacts to the effect that, if any person shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water, not being such as aforesaid, but which shall be private property, or in which there shall be any private right of fishery, the offender shall, on conviction before a justice of the peace, forfeit, besides the value of any fish taken or destroyed, a sum of money not exceeding five pounds.

In a subsequent part of the same section is a proviso, that nothing before contained in the section shall extend to any

person angling in the day-time; but that if any person shall, by angling in the day-time, unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any such water as firstly in the section mentioned, he shall, on conviction before a justice of the peace, forfeit a sum of money not exceeding five pounds, and if in any such water as lastly in the section mentioned, he shall, on a like conviction, forfeit a sum of money not exceeding two pounds.

The thirty-fifth section enacts to the effect that, if any person shall be found fishing against the provisions of the act, it shall be lawful for the owner of the ground, water or fishery, his servants, or any person authorized by him, to demand from the offender any fishing implements then in his possession, and, in case the offender shall not immediately deliver them up, to seize them for the use of such owner. In the same section is a proviso exempting from the payment of any damages or penalty any angler by whom any implements shall be delivered up, or from whom they shall be taken, according to the enactment contained in the section.

Animals which do not serve for food.—It is not correct to say of all animals that do not serve for food, that they cannot, by the common law, be subjects of larceny, inasmuch as it is a common law larceny to steal a horse, an ass, or a mule.

Dogs of all sorts and other creatures kept for whim and pleasure.—The thirty-first section of Peel's Larceny Act enacts to the effect that, if any person shall steal any dog, or any beast or bird ordinarily kept in a state of confinement, not being the subject of larceny at common law, the offender shall, on conviction before a justice of the peace, forfeit, besides the value of the dog, bird or beast, a sum of money not exceeding twenty pounds. If a person so convicted is afterwards guilty of a similar offence, his punishment, on conviction before one justice, is to be imprisonment, with or without hard labour, for not more than

twelve calendar months; if the conviction is before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped.

Dogs of all sorts and other creatures kept for whim and pleasure.—Dogs, cats and ferrets are specially mentioned in the law books as not being the subjects of larceny, and in respect of ferrets there is a decision to that effect. That dogs, cats and ferrets are all useful animals serves to take them out of the terms of Blackstone's description of animals, in respect of which, though reclaimed, larceny cannot be committed; they cannot be said to be kept only for whim and pleasure. Other writers speak of them as being of too base a nature to be the subjects of larceny. What may be meant by the phrase, base nature, so applied, is not explained. But for the horse, the ass and the mule, being subjects of larceny, it might be taken to mean not serving for food.

Of other animals often kept for whim and pleasure a long list might be made, including obviously singing birds, parrots, chained monkeys and tame foxes.

As a close to this lecture you may like to have a summary, prepared by me, of the animals, the stealing of which is, by the common law, the felony called larceny. In framing it I have taken pains to avoid, what appear to me to be the faults of former writers.

This is my summary:—

1. All domestic animals serving for food: such as oxen, sheep, goats, swine and domestic poultry.

2. Some domestic animals not serving for food: namely, horses, asses, mules.

3. Confined wild animals serving for food: such as deer, hares, rabbits, pheasants, partridges, fish.

4. Pigeons in a house or box in which they are kept, or from and to which, as their home, they are in the habit of flying.

5. Marked swans, though at large; unmarked swans, kept on a pond or private stream.

For the common law felony of stealing any animal comprised in this summary, Peel's Larceny Act (*a*) prescribes the punishment.

If any animal, not comprised in this summary, is stolen, the wrong is a mere trespass, the remedy for which is an action at law, unless Peel's Larceny Act prescribes a punishment for it.

(*a*) 7 & 8 George IV., chapter 29.

LECTURE LXXV.

1. *Arrest of Criminals.*
2. *Search Warrant.*
3. *Fraud.*
4. *False Pretence.*
5. *False Promise.*
6. *Misdemeanor merged in Felony.*

I RECALL your attention to the sixty-third section of Peel's Larceny Act (*a*), giving powers to arrest on the spot persons guilty of any offence for which punishment is prescribed by that statute, and giving a justice of the peace power to grant a warrant to search for any property in respect of which any such offence may have been committed. You have seen that these powers apply to thefts of minerals, trees, fixtures, writings and animals, and other things which are not, as well as those things which are, according to the common law, subjects of larceny.

The fifty-third section of the same statute prescribes a punishment for a very common offence, which, though not larceny, implies guilt of the same character as that of larceny, the offence of obtaining property by a false pretence. The powers given by the sixty-third section apply to persons guilty of this offence and to property obtained by it.

This fifty-third section recites that a failure of justice frequently arises from the subtle distinction between larceny and fraud, and, to remedy this, enacts to the effect that any person who by any false pretence obtains any chattel, money or valuable security, with intent to cheat or defraud any person of the same, is guilty of a misdemeanor. The section also provides to the effect that a person indicted for this misdemeanor shall not be acquitted by reason of his having obtained property in such a manner as to

(*a*) 7 & 8 George IV., chapter 29.

be guilty of larceny, and that a person tried for the misdemeanor shall not afterwards be prosecuted, on the same facts, for larceny. The punishment for this misdemeanor is penal servitude for not more than seven years and not less than three years, or fine or imprisonment, or both. The imprisonment may be with or without hard labour.

The section before us recites that a failure of justice frequently arises from the subtle distinction between larceny and fraud. To you this may require explanation.

When a falsehood is a trick, or a part of a trick, by means of which a person gets possession of a chattel, with the intention of depriving the owner of it, the crime is either larceny or fraud; but whether it is the one or the other depends upon the question whether the circumstances show that the owner was induced by the false pretence to part with the right of property in the chattel or only to part with the possession of it. If he meant to part with the possession only, the offence is larceny; if he meant to part with his right of property, the offence is that of obtaining property by a false pretence.

From a multitude of cases having reference to this distinction I select a few decisions, the purport of which is capable of being stated in a few words.

Upon the trial of a person charged with stealing two silver cream ewers it appeared that, after he had left the service of a customer of a silversmith, he went to the silversmith's shop and falsely told him that his master, meaning the customer whose service he had left, wanted a silver cream ewer, and desired the silversmith to give one to him and to put it down to his master's account. The silversmith gave the prisoner two silver cream ewers, that his customer might choose one. It was decided that the silversmith sending two ewers, in order that one might be chosen, parted with the possession only, and that the offence was larceny; but if he had sent but one cream ewer he would have parted with his right of property and the offence

would not have been larceny (*a*), and would have been the offence of obtaining property by a false pretence.

In another case Mr. Justice Patteson treated as a parting with possession only, and not as a parting with the right of property, the sending of five shawls in order that a choice might be made of one (*b*).

A person went to an inn, on a fair day, and told the ostler to bring out his horse, and upon the ostler saying he did not know which it was, went into the stable, and, pointing out a mare, falsely said it was his. By this false pretence he obtained what was deemed possession of the mare, and it was decided that he was guilty of larceny (*c*). The owner of the mare did not part with his right of property.

A person who, by falsely pretending to a carrier's servant that he was the person to whom goods were directed, obtained possession of them, was decided to be guilty of larceny (*d*). The right of property was not parted with.

Bear in mind that the statute does not abolish this distinction. It only prevents a person, indicted for a fraud as a misdemeanor, being acquitted, or prosecuted a second time, by reason of his guilt being that of larceny; as, but for the statute, he might be on the general principle of which I have spoken before, that a misdemeanor, being also a felony, merges in the felony.

In a case of a false pretence being a trick, or part of a trick, amounting to larceny, the offender may still be indicted, in the first instance, for the felony, and so receive, in a case of horse stealing for instance, a severer punishment than that prescribed for the misdemeanor.

As to other misdemeanors than that of obtaining property

(*a*) *The King* v. *Davenport*, reported by Archbold in his edition of Peel's Acts; 2 Russell on Crimes, Greaves' Edition, 28.

(*b*) *The King* v. *Savage*, 5 Carrington & Payne, 143; 2 Russell on Crimes, Greaves' Edition, 28.

(*c*) *The King* v. *Pitman*, 2 Carrington & Payne, 423.

(*d*) *The King* v. *Longstreeth*, 1 Moody's Crown Cases, 137.

by a false pretence, the practical effect of the principle, that a misdemeanor merges in a felony is modified by a statute made in 1851 (*a*), containing an enactment to the effect that a person tried for a misdemeanor shall not be entitled to be acquitted by reason of his guilt appearing to be a felony, and that a person tried for a misdemeanor shall not afterwards be prosecuted, on the same facts, for a felony, unless the court shall think fit to discharge the jury from giving a verdict, and direct the person to be indicted for the felony.

Innumerable decisions have been given as to what falsehoods are, and what falsehoods are not, false pretences within the meaning of the fifty-third section of Peel's Larceny Act and within the meaning of an enactment made in the reign of King George the Second having the same object. With reference to this part of our subject I shall content myself by adverting to only two points.

1. To be a false pretence within the meaning of Peel's Larceny Act a statement must be a false pretence of some existing fact, and not a mere false promise in respect of the future.

2. To a false pretence within the meaning of the statute, words, whether written or spoken, are not essential. A man's conduct, without words, may amount to a false pretence.

For illustrations of these two points I think it quite enough to refer you to those parts of Russell on Crimes, edited by Greaves, which apply to them. For what you may there read I cannot, even for you, attempt to write a substitute.

(*a*) 14 & 15 Victoria, chapter 100, section 12.

LECTURE LXXVI.

1. *Justice of the Peace. Duty out of Quarter Sessions.*
2. *Summary Jurisdiction exercised in Public.*
3. *Preliminary Investigations may be private.*
4. *Depositions.*
5. *Prisoner's Statement.*
6. *Remand.*
7. *Commitment.*
8. *Bail.*
9. *Recognizance.*
10. *Imprisonment.*
11. *Process.*
12. *Warrant.*
13. *Cause to be stated.*
14. *Habeas Corpus.*

I now remind you of the lectures in which I spoke of the various ways in which persons, accused of crimes, are brought before justices of the peace. I had then in view the point at which I am now arrived.

I do not purpose to say anything more of the duty of justices of the peace in respect of their summary jurisdiction under the Criminal Justice Act, or under any other statute. I shall now speak only of those cases in which they have not a summary jurisdiction, or in which, having it combined with a power to exercise it or not as they may think fit, they do not exercise it.

With regard to a person brought before a justice of the peace and charged with a crime, in respect of which the justice has not, or, having a choice, does not think proper to exercise, a summary jurisdiction, the duties of the justice are defined by a statute made in 1848 (*a*) to facilitate the performance of the duties of justices of the peace out of sessions with respect to persons charged with indictable offences.

The provisions of this statute are so remarkably precise and clear, that I cannot think I should be rendering you any service by attempting to state the effect of any parts of it, as I am in the habit of doing with respect to acts of parliament, to which I direct your attention,—sooner or later every law student and every magistrate

(*a*) 11 & 12 Victoria, chapter 42.

becomes well acquainted with the details of this useful part of the statute law by consulting from time to time the statute itself.

The manner in which a justice of the peace investigates a charge, in respect of which he does not exercise a summary jurisdiction, is so minutely prescribed by some sections of the statute, and his duties, with reference to other points are so carefully described in other sections, that the statute itself has the character of a book of practice, a manual, for which it would be difficult to frame a substitute.

One section of the statute carefully confirms the rule of law, that the room in which the investigation is taking place is not an open court, and also confirms the power of the justice to order the exclusion of persons from it. I have before told you that a summary jurisdiction must be exercised in an open court. The reasons are apparent for this distinction between a court in which justice is definitely administered, and a room in which a magistrate superintends a preliminary inquiry. In the latter case publicity might greatly tend to defeat the object of the inquiry. It often happens that a part of the evidence is taken at one sitting, and the prisoner is remanded and again brought before the justice. This sometimes happens more than once. During a remand, the friends of the accused may be as active in stifling, as the police in searching out, proofs to which the previous evidence has directed their attention. This inconvenience may be prevented by a justice exercising his power to order the room in which he sits to be cleared. There is seldom occasion to do this.

By clearly expressed enactments five points are specially provided for.

1. The depositions of the witnesses are to be taken in writing in the presence of the accused, and he is to be at liberty to cross-examine them.

2. The accused is to be cautioned that he need not make any statement, but that, if he makes a statement, it may be used against him at his trial. Any statement he makes is to be taken down in writing.

3. If it appears that any promise or threat has been made to induce him to confess his guilt, he is further to be cautioned that he has nothing to hope from the promise or fear from the threat, and that, notwithstanding the promise or threat, any statement he may make may be given in evidence against him.

4. A prisoner committed for trial, or holden to bail for that purpose, is entitled to copies of the depositions against him.

5. If, at the time of the trial, a witness is dead, or so ill as not to be able to travel, his deposition may be read as evidence.

The investigation usually ends, if not in the dismissal of the charge, in the committal of the accused for trial at the quarter sessions, or in the country at the assizes, or in London and its immediate neighbourhood at the Central Criminal Court.

Justices of the peace have ample discretionary powers to admit accused persons to bail instead of sending them to gaol to wait their trial. Of these powers, and of the exercise of them, and of the recognizances which the justices take from the sureties of the accused for his appearance in the court in which he is to be tried, I might have much to say but for the minute instructions and forms contained in the statute itself.

Blackstone says (*a*): "To make imprisonment lawful it "must either be by process from the courts of judicature, "or by warrant from some legal officer having authority "to commit to prison; which warrant must be in writing, "under the hand and seal of the magistrate, and express "the causes of the commitment, in order to be examined "into (if necessary) upon a habeas corpus. If there be no "cause expressed, the gaoler is not bound to detain the "prisoner; for the law judges in this respect, saith Sir "Edward Coke, like Festus, the Roman governor, that it "is unreasonable to send a prisoner, and not to signify "withal the crimes alleged against him."

(*a*) 1 Blackstone's Commentaries, 137.

Habeas corpus.—To an English lawyer these are as magical words; and he is never more animated, in speech or in writing, than when they are his theme. These two words are the name of a writ, by means of which, or by means of an application for it, a person imprisoned, or otherwise confined against his will, has a right to have the legality of his detention considered by a court of justice having power to discharge him from illegal custody, or to admit him to bail, or to remand him to legal custody.

This writ takes its force from an ancient usage and custom to issue it and to obey it. This usage and custom, itself a part of the common law of the land, is strengthened and extended by several parts of the statute law, which I shall make the subject of a distinct lecture.

The writ may be issued from either of the Courts of Chancery, Queen's Bench, Common Pleas and Exchequer, and commands the person detaining the person named in the writ to have immediately his body in the court from which the writ is issued. It is applied for, not as a matter of course, but by a motion founded on affidavits, and it is granted, if, by the affidavits, it appears that the imprisonment is unlawful or that its legality is questionable, or that the prisoner ought to be admitted to bail.

The writ is in this form:—

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the keeper of our gaol at Maidstone, in and for the county of Kent, greeting: We command you that you have in our court before us at Westminster immediately after the receipt of this our writ the body of John Smith, being detained under your custody as is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called therein, to undergo and receive all and singular such matters and things as our said court shall then and there consider of and concerning him in this behalf: And have you then there this writ.

Witness, Sir Alexander James Edmund Cockburn, Baronet, at Westminster, the seventeenth day of November, in the twenty-fourth year of our reign.

By the Court.

LECTURE LXXVII.

1. *Habeas Corpus.*
2. *Petition of Right.*
3. *Imprisonment. Command of the King.*
4. *Privy Council.*
5. *Imprisonment without Cause assigned.*
6. *Star Chamber.*
7. *Habeas Corpus Act.*
8. *Commitment for Crime.*
9. *Persons Bailable.*
10. *Treason.*
11. *Felony.*
12. *Term.*
13. *Vacation.*
14. *Civil Process.*
15. *Imprisonment in Scotland or Ireland, or beyond Sea.*
16. *Detention without Process.*
17. *Disobedience of Habeas Corpus.*
18. *Truth of Return examined.*
19. *Discharge.*
20. *Bail.*
21. *Remand.*
22. *Wife detained.*
23. *Child detained.*
24. *Judges. Independence.*

The celebrated Petition of Right, which became by the assent of the King, Charles the First, an Act of Parliament (*a*), recites as one of the grievances intended to be redressed, that, against the tenor of the Great Charter, and of a statute made in the reign of King Edward the Third, and other the good laws and statutes of the realm, divers of the king's subjects had of late been imprisoned without any cause shown, and when for their deliverance they were brought before the king's justices by the king's writ of habeas corpus, there to undergo and receive as the court should order, and their keepers commanded to certify the cause of their detainer, no cause was certified but that they were detained by the king's special command, signified by the Lords of the Privy Council, and yet were returned back to several prisons, without being charged with any thing to which they might make answer according to law. The enactment applicable to this grievance is that "no freeman in any such manner as is before mentioned be imprisoned or detained."

(*a*) 3 Charles I., chapter 1.

Not to speak of the history of this great law, and of the fatal disregard of it by the monarch from whom it was wisely exacted by a parliament of which true patriotism was the leading motive, we learn from the history of every country and of every period that all tyrannies, regal or republican, chiefly oppress those who are subject to their power by imprisoning them, without cause assigned, and without opportunity of appealing to any judicial tribunal.

Some parts of my next extract from Blackstone serve to bring to mind, at the same time, the ancient republic of Venice and the modern kingdom of the Two Sicilies. As to the latter, writing in the winter of the year 1860, I think of the prisons of Naples and Palermo, and of the events of the past summer and autumn.

Blackstone says: "Some have thought, that unjust attacks, even upon life, or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth, than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of his person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government."

The statute by which, about twelve years after the petition of right, the Court of Star Chamber was abolished, contains an enactment for securing the right, to a writ of habeas corpus, of every person imprisoned by the order of the Court of Star Chamber, or of any court having or pretending to have, a like jurisdiction, or by command or warrant of the king, or of the council board, or of any lords or others of the privy council.

The praises lavished by historians and lawyers on the next of the laws I am now reviewing, the famous Habeas

Corpus Act (*a*), made late in the reign of King Charles the Second, are well deserved. Combined with the common law it is a law of inestimable value, cherished by all Englishmen as an essential part of those of their laws by which personal liberty is secured.

The statute recites to the effect that great delays had been used by sheriffs, gaolers, and other officers, to whose custody persons had been committed for crimes, or supposed crimes, in making returns of writs of habeas corpus, by different shifts to avoid yielding obedience to the writs, contrary to their duty and the known laws of the land, whereby many of the king's subjects had been, and thereafter might be, long detained in prison, in cases where by law they are bailable. This recital is followed by a section beginning with these words: "for the prevention whereof " and the more speedy relief of all persons imprisoned for " any such criminal, or supposed criminal matters;" and it proceeds to make an enactment requiring the sheriff, or gaoler, or other person, to whom a writ of habeas corpus is delivered, to bring before the court or judge before whom the writ is made returnable the person named in the writ, unless committed for treason or felony, within three days if the place of detention is not more than twenty miles from the place where the court or judge is residing, within ten days if the distance is more than twenty, and not more than one hundred miles, and within twenty days if the distance is more than one hundred miles. This enactment serves well to place in view the contrast between the modes of travelling in the reign of King Charles the Second and in the reign of Queen Victoria. The section contains directions in respect of the expenses of travelling to be paid by the person in respect of whom the writ is issued.

By reason of the courts sitting at Westminster only in term time, and by reason of the great length of some of the vacations, a person might formerly be imprisoned for

(*a*) 31 Charles II., chapter 2.

many weeks or even for several months without being able to sue out a writ of habeas corpus. To remedy this the statute contains an enactment imposing on the Lord Chancellor, the Lord Keeper of the Great Seal, and every one of the judges and barons of the King's Bench, Common Pleas and Exchequer, the duty of issuing, in time of vacation, on the request of any person committed for any crime other than treason or felony, a writ of habeas corpus, and the further duty of admitting him to bail unless duly committed for an offence in respect of which he is not bailable.

The statute imposes great pecuniary penalties on the Lord Chancellor and other judges for denying, and on sheriffs and other officers for not duly obeying, writs of habeas corpus.

One section makes a provision for the discharge of persons committed on charges of treason or felony, and not promptly brought to trial in pursuance of the commitment.

The statute contains a provision that a discharge of a person from custody, in respect of a crime, shall not have the effect of discharging him from custody in respect of any civil cause.

The statute contains enactments to prevent the undue removal of persons from one prison to another, and to prevent the imprisonment of inhabitants of England or Wales in Scotland or Ireland or in Jersey or Guernsey or other places beyond sea.

Of the many useful provisions of which the Habeas Corpus Act consists, I have stated the general purport and effect of only those which are most prominent and interesting.

You have seen that the Habeas Corpus Act contains provisions in respect of persons imprisoned as for crimes or in civil causes. In other cases, a comparatively modern act of parliament extends and regulates the right to writs of habeas corpus.

Of the statute (*a*) just mentioned, made in the year 1816, the first section enacts to the effect, that when any person shall be confined or restrained of his liberty, except for a crime or supposed crime, or for debt, or by process in a civil suit, any one of the judges and barons of the King's Bench, Common Pleas and Exchequer shall, upon complaint by or on behalf of the person confined or restrained, if it shall appear by affidavit that there is probable and reasonable ground for the complaint, award in time of vacation a writ of habeas corpus, returnable immediately before the same judge or baron, or some other judge or baron of the same court.

The second section provides for the punishment, as for a contempt, of any person not obeying a writ of habeas corpus issued in pursuance of the act.

The same section permits a judge or baron, in the case of a writ of habeas corpus, issued late in a vacation, to make it returnable in court in the following term: and it also enables a court to make a writ of habeas corpus, issued during a term, returnable before a judge or baron in time of vacation.

The third and fourth sections enable any court or judge or baron, receiving a return to a writ of habeas corpus, in any case provided for by the act, to examine into the truth of the facts stated in the return, in order to discharge, admit to bail, or to remand, the person detained.

Of this statute of 1816 I have mentioned only the most prominent parts. The sixth section applies to writs, issued in pursuance of the Habeas Corpus Act, the power to make a writ, issued in a vacation, returnable in term, or a writ, issued in a term, returnable in vacation, and the provision for the punishment, as for a contempt, of a person disobeying a writ.

It is an ancient usage and custom to issue the writ of habeas corpus in other cases than those of actual imprison-

(*a*) 56 George III., chapter 100.

ment. For instance, it is sometimes used for the purpose of enabling a court or judge to restore to a husband his wife, or to a parent his child, unlawfully kept away from him by other means than personal confinement.

I rejoice in the reflection that in these lectures I have found a place for this account of the chief fortress of personal freedom, entrusted, by the laws of England, to the safe keeping of the judges of the realm, whose independence is secured by wise legislation.

Before the revolution, and for a few years after it, the judges could be removed from their offices at the pleasure of the crown, a state of dependence of which some of our kings did not fail to take advantage. According to a statute made in the reign of King William the Third (*a*), a judge cannot be removed from his office except in pursuance of an address from both houses of parliament; and according to a statute made in the reign of King George the Third (*b*), the commissions of the judges are not vacated, as previously, by a demise of the crown.

The value of these two laws is abundantly evinced by the details of the State Trials before and since the revolution. The contrast is unspeakably great.

I know not whether any parts of the professional instruction you will henceforth receive from me will take the form of lectures. Therefore it is yet uncertain whether this Second Series will be followed by a Third.

(*a*) 13 William III., chapter 2.
(*a*) 1 George III., chapter 23.

SUPPLEMENTAL LECTURE I.

1. *Tenure.*
2. *Manor.*
3. *Land.*
4. *Buildings.*
5. *Trees. Fences.*
6. *Minerals.*
7. *Fixtures.*
8. *Allodial Land.*
9. *Feudal Land.*
10. *Conquest.*
11. *Confiscation of Land by William the Conqueror.*
12. *Grants to Normans.*
13. *Feudal System.*
14. *Feud. Fief.*
15. *Fee.*
16. *Escheat.*
17. *Escheat for Felony.*
18. *Subinfeudation.*
19. *Quia emptores. Statute.*
20. *Alienation.*

THESE supplemental lectures on tenures are now written in deference to the wishes of a gentleman for whose opinion I have a great respect, and whose friendship I gained by means of the first series of my lectures. The right place for them would have been, in the first series, immediately before the lecture in which copyholds are first spoken of. Other friendly critics have mentioned to me as a defect in that lecture, the want of a definition of a manor.

The subject of tenure is land, comprising not only, as it is right now to remind you, land according to the ordinary meaning of the word, but everything permanently annexed to it; for instance, trees, fences and buildings. The hyperbole :—cujus est solum, ejus est usque ad cœlum, is good law, as to everything above the surface of land, and it is equally the law, that everything below the surface belongs to the owner of it. Of the exceptions by grant or prescription, as when one person may be entitled to the soil, to cultivate it or build on it, and another to the minerals below it, and of the numerous exceptions established by law, as in the case of the right of a tenant to fixtures set up by him for the purposes of trade, I need not now speak. It is enough for my present purpose to say that

presumptively everything affixed to the land is a part of the land.

That the presumption may be rebutted by evidence of a grant or prescription inconsistent with it, and that it may be rebutted by evidence of facts raising a legal exception, are points with which you will become familiar when, as a necessary and difficult part of your studies, you read the law of fixtures.

Bear in mind then that, when in this lecture I speak of land, I mean land properly so called, however altered by the erection of buildings or otherwise, and as comprising all buildings standing on it.

Also, I premise that, whenever in these supplemental lectures you meet with the word land, you are to understand that freehold land is meant, unless copyhold land or leasehold land is specified.

Having thus, according to a good old fashion, defined the sense in which I intend to use a word capable of several meanings, I proceed to explain the nature of freehold tenure.

You know the difference between allodial land and land the subject of tenure. Of allodial land the owner is the simple and absolute owner, as he is of any moveable things, for instance, of the furniture of his house, or of his clothes, or of his cattle.

Of land not allodial the owner is only a tenant: he holds (tenet) of a person who, relatively to him in respect of the land, is his lord or superior.

According to our law, conforming to what is called the feudal system, as it prevailed in some parts of Europe after the subversion of the Roman Empire, the owner of all land is the Crown, holding it of no human lord or superior. Land in the actual possession of the Crown may be said to be the only allodial land in this country; for, also in conformity with the feudal system, all land in England, not in the actual possession of the Crown, is holden either immediately of the Crown or of persons who hold of

the Crown, and who are termed the lords of those who hold of them.

Of the system of tenures prevailing in England you must, early in your studies, make yourselves well informed. At this time I shall be content to speak only of some of the more striking features of the system.

To what extent the feudal system prevailed in this country before the conquest is an obscure point. I begin, therefore, by reminding you of the first great, and of the second greater, confiscation by William the Conqueror, of the lands of the Saxons, and of his lavish grants of them to his Norman followers.

These confiscations and grants were so general, and affected territories so vast, that all the lands in England, with comparatively unimportant exceptions, may be said to have changed owners. As the grants were so made, that the grantees were to hold of the Crown, they may be said to have been one of the means by which the feudal system was established in England.

Blackstone and other writers treat some laws made in the reign of the Conqueror in great councils of the realm, as an actual establishment or formal recognition of a feudal system of tenures in this country, binding all possessors of land to military service. But I think those laws may be regarded only as an express recognition of the duty of all freemen, whether owners of land or not to swear fealty to the king, and also to defend him in war; the reference to lands and tenements being applicable only to persons holding lands, whether of the king or of other lords by military services, and therefore being under a direct obligation, greater than that of others, to serve regularly in war. As I shall soon explain, there always have been some lands, the tenure of which was not by military service.

I think that the rule, that all lands, not the property of the Crown, are holden of the Crown, gradually became a part of the common law. The universal prevalence of an

ancient usage and custom, gradually formed to this effect, serves to account for all the lands in England becoming feudal, while in Normandy itself, whence, some say, the Conqueror brought the feudal system, and in other parts of France, there were, even before the French revolution destroyed feudal rights, some allodial lands. There were parts of France in which lands were presumed to be allodial until they were proved to be feudal. The same presumption has always prevailed in Germany and Holland. In England, on the contrary, all lands, not the property of the Crown, are not merely presumed to be, but actually are subject to tenure; none but the Crown lands being allodial. Thus says the common law of the land, that is ancient usage and custom.

The persons to whom the Conqueror and his successors granted lands were, in respect of them, the immediate tenants of the Crown, and they and their heirs were accustomed to grant portions of them to others to be holden by the grantees and their heirs, of the grantors and their heirs.

Again, these grantees might grant the lands, or a portion of them, to be in like manner holden of themselves; and consistently with the law, there might be quite a chain of tenants: the immediate tenant of the Crown being the first, the actual possessor of the land being the last link. The immediate tenants of the Crown were said to hold of the king in chief (in capite).

In the event of the death of any grantee without heirs, or in the event of any subsequent failure of his heirs, the land escheated, that is, reverted, to the grantor or his heirs. This liability to escheat was an essential incident to tenure.

In the event also of a tenant being convicted of any felony, his land escheated to his lord.

In the language of the feudal system, a person holding land of another was said to have a fee, fief, feodum, or feud. Hence is the origin of the word "feudal," and of the

phrase "feudal tenures." Grants of land by others than the sovereign have been, with sufficient propriety, called subinfeudations; and the habit of making them became a great evil, for which, in the reign of King Edward the First, a remedy was provided by a statute, called from its initial words, the Statute of Quia emptores. This statute enacted to the effect, that thenceforth it should be lawful to every freeman to sell, at his own pleasure, his lands or part of them, so that the buyer should hold the same lands of the chief lord of the same fee, by such customs and services, as the seller held them before. Thus subinfeudations became impracticable, and this is the law to this day.

One obvious effect of the statute was, that thenceforth an escheat might happen, not on the failure of heirs of the original grantee, but on the failure of heirs of the purchaser, the substituted owner of the estate. Every conveyance of an estate became in reality the substitution of a tenant holding of the same lord, and in the same manner as the seller; and this also is the law at this time.

SUPPLEMENTAL LECTURE II.

1. *Quia emptores. Statute.*
2. *Subinfeudation.*
3. *Knight-Service.*
4. *Wardship.*
5. *Marriage.*
6. *Escheat.*
7. *Escheat for Felony.*
8. *Alienation of Land.*
9. *Restraints in Alienation.*
10. *Edward the First.*

HAVING treated of the nature of tenure generally, I shall soon discuss the several species of tenures. But, before this, I wish you, with another object, to peruse the Statute of Quia emptores.

You will then perceive that, according to the preamble, the intention of the legislature was to relieve the great men of the realm from the grievances they sustained by means of sales of land holden of them, and so conveyed as to be thenceforth holden by the buyers and their heirs, of the sellers and their heirs.

Of these grievances, which were many, I will now, by way of illustration, specify four:—

1. When the Statute of Quia emptores was made, a very extensively prevailing tenure of land was that called tenure by knight-service, the service in respect of it being that of serving the lord of the fee in war. Now, while subinfeudations were lawful, a lord of a fee, needing the military services of his freeholders, might find that, by means of subinfeudations granted by themselves or their ancestors, they had become so impoverished as not to be in a condition to perform their services. At the same time, not being the lord of the substituted tenants, he would not be able to exact the services from them.

2. You know that one incident of tenure by knight-service was, that the lord of a fee had the wardship of the person and lands of any male tenant inheriting under the age of twenty-one years, and of any female tenant inheriting under the age of fourteen years. The wardship

continued, in the case of a male until he was twenty-one years old, in the case of a female until she was sixteen years old. The lord maintained and educated the infant tenant, and provided for the performance of the services, and did not account to any one for the profits of the lands. A wardship might be of great value; but it might also be worthless by reason of the ancestors of the ward having parted with their lands by way of subinfeudation.

3. The lord of an infant tenant might dispose of his ward in marriage, he might, in fact, sell the marriage; and a ward, refusing a marriage offered by his lord, forfeited to him the money-value of the marriage. It is plain, that by reason of subinfeudations granted by a ward's ancestors, his marriage might be of little or of no value. This grievance is specially referred to in the Statute of Quia emptores. The right of a lord to sell the marriage of his ward implies a coarseness of sentiment prevailing in the times in which the right existed. The tyranny with which it was exercised must have been a greater grievance to the youthful tenants than the loss of its advantages could be to the lords.

4. A family impoverished by subinfeudations might by change of residence, or by falling into obscurity, be lost sight of by the lord of the fee, and there might be a failure of heirs, or a conviction for felony, and a consequent escheat, which might never come to the knowledge of the lord; and the lands might, to the lord's injury, remain in the possession of the representatives of persons to whom they were granted by way of subinfeudation, and whose estate ought to cease upon the failure of the heirs of the person who granted it, out of whose estate it was in truth carved.

Returning to the statute, and passing on from the preamble, you will perceive that the effect of the direct enactment, expressly stated to be made at the instance of the great men of the realm, is to establish the right of all freehold tenants to sell their lands at their own pleasure,

the immediate interests of the great men themselves being provided for, less directly, by words qualifying the direct enactment. In truth, this ingeniously framed law, made for the benefit of the great men and securing to them great advantages, conferred upon all freehold tenants, a power of the first importance, that of selling their lands at their own pleasure. Thus was impliedly repealed a clause in the great charter (or rather in the confirmation of it in parliament, in the reign of King Henry the Third, for the clause was not in the great charter of King John), prohibiting the gift or sale of land, unless the giver or seller reserved to himself enough land to enable him to perform the services to be rendered in respect of the whole fee.

It looks as if King Edward the First had insisted on this implied repeal of every restraint on the alienation of land, as a price yielded by the great men for the removal of the grievances of which they complained. Edward, one of the most subtle of politicians, knew well that facilities for the sale of land tended to reduce the then inordinate power of the barons. Their own necessities would induce them to sell land; and they would thus, by their own act, diminish their vast possessions and consequent power. One of the wisest of legislators, Edward could not fail to know the immense advantage to the community of a free commerce in land, by means of which, instead of remaining unimproved in the hands of needy or embarrassed, or sluggish, or thriftless, or unskilful owners, it might pass into the hands of the industrious, or the enterprising, or the skilful, or of persons by the expenditure of whose capital it might be improved for the public good.

In your studies you will always be meeting with proofs, that the spirit and policy of English law, unwritten and written, and of English lawyers, have been constantly, though not invariably, adverse to restraints on the alienation of property. The course of the stream, though now and then a bend may be perceptible, has always maintained one direction.

SUPPLEMENTAL LECTURE III.

1. *Species of Tenures.*
2. *Knight-Service.*
3. *Great Council.*
4. *Parliament.*
5. *Barons.*
6. *Commons.*
7. *Barony by Tenure.*
8. *Grand Serjeanty.*
9. *Socage.*
10. *Petit Serjeanty.*
11. *Burgage.*
12. *Borough-English.*
13. *Gavelkind.*
14. *Primogeniture.*
15. *Escheat for Felony.*
16. *Frankalmoign.*
17. *Military Tenures abolished.*
18. *Socage substituted.*
19. *Wardship.*
20. *Appointed Guardian.*

I NOW keep my promise to speak of the several species of tenures.

Until the time of Charles the Second a widely extensive tenure of lands, whether directly holden of the king, or of other lords, was the military tenure called tenure by knight-service. The distinguishing feature of the tenure was a service called knight-service, implying a duty, on the part of every tenant, to serve his lord in war. Thus, in time of need, the sovereign might find himself surrounded by an army consisting of the great men of the realm, and their freehold tenants.

Occasionally the king summoned some of the chief of the immediate tenants of the Crown to the great council of the realm, a council which acquired the name of the parliament, and to which, in the course of time, were added representatives of the Commons chosen by freeholders for counties, by burgesses for boroughs.

The great tenants in chief summoned to parliament acquired, by a sort of prescription, a right to be so summoned, by reason of their tenure of their estates. An estate to which this right became annexed was called a barony, and every successive owner of it was, by the title of baron, a lord of parliament. There are said, and I think

with truth, to be some yet subsisting baronies by tenure; though this is controverted in a case now pending before the House of Lords.

In a few cases the services due from tenants of the Crown did not imply the duty of serving the king in his wars, but were honorary, and concerned the king's person. An instance was, the service of carrying the king's banner or sword, or of being his champion at his coronation. In these cases the tenure was called grand serjeanty. Tenure by cornage was, when the service was that of winding a horn, to give warning of the entry of any enemy into the kingdom. It was regarded as a species of grand serjeanty.

Next in importance to the military tenures was a tenure of a peaceful character, the duty of the tenants being to render to the lord agricultural services; as, for instance, to plough for him a certain number of days in the year, or to pay him a certain rent either in money or corn or otherwise, and sometimes both to render services and pay rent. The tenure last described acquired the name of tenure in socage, derived from the word soc, a Saxon word for a plough. Of this tenure the essential characteristic was the certainty of its services and rents, as distinguished from the uncertainty of military service, and of other burthens to which tenants in knight-service were subject.

One tenure, said by Littleton to be in effect a species of socage, by reason of the sort of certainty just spoken of, was distinguished by the name of petit serjeanty. This was when a person held land of the king, rendering to him annually some small implement of war, as a bow, an arrow, a sword or a lance.

Tenure in burgage is spoken of by Littleton as a species of socage. It is when the king or any person is lord of an ancient borough, tenements within which are holden of him at a certain rent. To this day there are several houses in Gloucester, an ancient borough, the owners of which pay small rents to a gentleman who has purchased of the Crown

the right to receive them. From this circumstance I infer that burgage tenements in Gloucester are holden of the Crown, as the lord of that ancient borough. In practice you will sometimes find among title deeds conveyances of ancient boroughs, and meet with instances of the receipt of small rents in respect of tenements within them. In some boroughs, as you are aware, burgage tenements are subject to the custom of borough-English, of which I said so much in one of the earliest of my lectures.

The tenure of gavelkind lands is a species of socage, modified by the peculiar customs to which the lands happen to be subject, and chiefly by the customary descent to all the sons of a deceased tenant, and not, according to the general law, to his eldest son only. The right of primogeniture is indeed essential to military tenure, preserving, as is its plain tendency, to the successive actual possessors of land adequate means to bear the expense of serving in war; whereas repeated gavelkind descents, by frittering large estates into very small portions, might leave the lord of a fee without one tenant able to maintain himself in the field. Gavelkind was a socage, and not a military tenure; and considering the burthensome nature of knight-service the inhabitants of Kent were fortunate in being able to preserve their peaceful tenure, regarded as one of the privileges of which the people of that county have always been proud.

Another part of the custom of gavelkind was, that gavelkind lands did not escheat for felony; a privilege not without value in disorderly times.

Tenure in frankalmoign is that by which the clergy hold their lands; the services for which are the offices of the church. My concise definition of frankalmoign differs in terms, but not in substance, from that of other writers; inasmuch as I have adapted it to the present state of the church. In framing it I have not mentioned the services often in ancient times reserved in grants of lands to the

clergy, masses, for instance, for the souls of the grantors and their heirs, which cannot be rendered by the protestant successors of the grantees, and for which the daily offices of the church are therefore substituted, partly by usage, partly by the indirect, but necessary, effect of different statutes passed since the Reformation.

Immediately after the Restoration of King Charles the Second an act of parliament was passed to abolish the tenure by knight-service and its numerous incidental courts, proceedings, payments, burthens, grievances and oppressions specified in the statute (*a*), and the consideration of which would lead me too far from my immediate object, that of making clearly known the now existing state of the tenure of freehold land. The statute might be made the text of a treatise interesting to students of legal antiquities and to yourselves and other diligent readers of history.

The effect of this long statute may, for my present purpose, be stated in a very few words: every sort of freehold tenure, except socage and frankalmoign, is abolished; and all lands, holden before the statute by any tenure abolished by it, have since the statute been holden, and still continue to be holden, in socage. Our only subsisting freehold tenures are therefore the lay tenure in socage, and the clerical tenure in frankalmoign.

Though in other respects grand serjeanty is one of the tenures converted into socage, the statute provides that the honorary services are still to be rendered in respect of lands holden by it. It thus happens that many honorary services are still rendered at a coronation.

By reason of the pending controversy, whether there may now be a right to a peerage by reason of the tenure of land, I refer you to the eleventh section, enacting to the effect that nothing contained in the act is to infringe or hurt any title of honor, feodal or other, by which any person

(*a*) 12 Charles II., chapter 24.

has, or may have, a right to sit in the Lords' house of parliament, as to his title of honor or sitting in parliament, and the privileges belonging to him as a peer.

By way of substitute for the wardships abolished by the statute, power is given to a father to appoint, by deed or will, a guardian of his children during their minorities, and a guardian so appointed is invested with ample powers.

You know that when a tenant in socage is under the age of fourteen years his guardian is his next of kin, not being capable of being his heir. By a provision contained in the statute the authority of a guardian in socage is superseded by that of a guardian appointed by the infant's father. On the subject of socage wardship I shall speak more in detail in my next lecture, in which I shall treat of the consequences now actual or possible of freehold tenure.

SUPPLEMENTAL LECTURE IV.

1. *Tenure.*
2. *Manor.*
3. *Reputed Manor.*
4. *Tenement.*
5. *Subinfeudation.*
6. *Quia emptores. Statute.*
7. *Demesne Lands.*
8. *Waste Lands.*
9. *Commons.*
10. *Honor.*
11. *Lordship.*
12. *Baronies by Tenure.*
13. *Copyholds.*
14. *Socage.*
15. *Burgage.*
16. *Services.*
17. *Rents.*
18. *Reliefs.*
19. *Heriots.*
20. *Suit of Court.*
21. *Fealty.*
22. *Court Baron.*
23. *Leet.*
24. *Customary Court.*
25. *Wardship.*
26. *Escheat.*
27. *Will devising Land.*
28. *Knight-Service converted into Socage.*
29. *Forfeiture for Treason or Felony.*
30. *Year, Day and Waste.*
31. *Escheat for Felony.*
32. *Corruption of Blood.*
33. *Inheritance. Statute.*
34. *Trustee. Escheat.*
35. *Mortgage. Escheat.*
36. *Allodial Land.*

Approaching my definition of a manor, I must first present to your minds definitions of a tenement and of a freehold tenement.

A tenement is land holden of another.

A freehold tenement is land holden by a person and his heirs of another and his heirs.

True it is that the estate in a freehold tenement may be so dealt with, that a person may hold the land for life, and a tenant for life is a freeholder; but then the reversion, the right to the land, subject to the tenancy for life, still subsists in some person and his heirs; and it is to this right that, in such a case, may be referred my definition of a freehold tenement.

A manor is a territory within which are freehold tenements holden of a person who is termed the lord of the manor. As there cannot, since the Statute of Quia

emptores, have been any subinfeudations, and as, in other words, no freehold tenement can have been since created, it follows that every lawfully existing manor must have existed before the year 1290, in which year the statute was made.

The lands within a manor, which never having been granted to be holden either by freehold or copyhold tenure, have always remained in the possession of the lord or of his leasehold tenants, are termed the demesne lands of the manor, or the lords demesne (terræ dominicales).

Sometimes there are within a manor waste lands, that is, lands which are not part of the demesne lands, and which have never been granted to be holden by any tenure. Over these wastes, often called commons, the lord and his tenants, whether freehold, copyhold or leasehold, have usually prescriptive rights of common, the soil being the property of the lord. Since inclosures have become frequent, the number of instances of these waste lands has been greatly diminished.

It sometimes happens that two or more manors are the freehold tenements, or some of the freehold tenements, holden of another manor. In a case of this sort the superior manor is sometimes called an honor or lordship. You have heard of the honor of Woodstock.

It was probably, by reason of their tenure of some of the more important of these honors or lordships, that the great men of the realm were anciently summoned to parliament. Hence it is that there have been and, as many lawyers think, still are some peerages, baronies by tenure.

Of the freehold of land subject to copyhold tenure the lord of the manor is the owner.

So little is now ever said or thought of tenure and its consequences, that it is usual for the owner of any freehold land to regard it as his own absolutely. I believe there are thousands of landowners who would be surprised if they were told that they hold their freehold lands of others, who in respect of the lands are their superiors or lords. Of the

modern consequences, actual or possible, of this relation of lord and tenant, I can now speak the more clearly by reason of my having first spoken of the nature of a manor.

The consequences, actual or possible, of the only lay freehold tenure now existing, and called socage, are services, rents, reliefs, heriots, suit of court, fealty, wardship, escheat.

1. Services.—You remember that, in the explanation of the nature of socage tenure, the certainty of its services was spoken of. This privilege of certainty was an important distinction between socage and what was deemed the nobler tenure by knight-service, and the inferior tenure by copy of court roll. It so happens that I have no personal knowledge of agricultural or other personal services being in our times rendered by freeholders to the lord of any manor.

2. Rents.—I have known many instances of small yearly rents, bearing different names, such as chief rents or head rents or quit rents, being regularly paid by freehold tenants to lords of manors; and I have met with other instances of the liability of owners of freehold lands to ancient rents being mentioned in their title deeds. There are instances of rents paid by burgage tenants to the lords of their boroughs.

These rents, which when first received might be regarded as something more than an acknowledgment of tenure, have, by reason of subsequent changes in the value of money, become of so little importance, that in most cases the collection of them has been long discontinued. In very many cases the right to them has been lost by lapse of time.

3. Reliefs.—Incident to every sort of tenure is the right of the lord to receive from the heir of a deceased tenant a payment called a relief. In the case of our socage tenure the relief due by law is a year's rent; and Blackstone says: "Wherever lands in fee-simple are holden by a rent, relief "is still due of common right upon the death of the tenant."

I have never known, and I do not remember to have read or heard of, a relief paid by any modern freeholder or demanded of him.

4. Heriots.—It sometimes happens, that, by the custom of a manor, the lord is upon the death of a freehold tenant entitled to a heriot. According to the custom of the particular manor, a heriot is either the tenant's best beast or his best chattel or a money payment. I have never known an instance of a heriot being exacted in respect of a freehold tenement. Of the render of heriots for copyholds instances are common.

5. Suit of court.—Incident to every manor is a court called a court baron, formerly having in practice, and still having in theory, jurisdiction over a variety of subjects. The lords of some manors still hold their courts baron, though but little real business is transacted at them. Of the court baron, the judges, called the suitors, are the freehold tenants of the manor.

It is the duty of every freehold tenant to attend a court baron, if duly summoned. Attending it, he is said to do suit of court.

At a court baron at least two freeholders must be present; and it has been said to be essential to the continued existence of a manor, that there should continue to be at least two freehold tenants to do suit of court; and it has also been said, that if, by purchase or otherwise, all the freehold tenements within a manor, or all but one, become the property of the lord, and so cease to be holden of him, the manor ceases to exist. This may explain the not unfrequent use in legal documents of the phrase "manor or reputed manor." A reputed manor may be a district, formerly a manor, but which, for want of freehold tenements, has ceased to be a manor.

If, by prescription or grant, a lord of a manor is entitled to hold a court leet, he usually holds it at the same time and place that he holds his court baron; and so if, within a manor, there are any copyhold tenements, the customary

court for the transfer of copyholds is usually holden at the same time and place as the court baron. Of the court leet and of the customary court the steward of the manor is the judge.

6. Fealty.—Fealty is a tenant's oath of fidelity to his lord. According to the course of common law every change of any of the freehold tenants of a manor ought properly to be presented at the next court baron, and the new tenant ought then to do fealty.

The title of the heir of a freeholder being perfect by descent, and the title of a purchaser being complete by his deed of conveyance, it has not, for a long period, been the practice to recognize the title of either by presentment at the court baron, or to receive the fealty of either. Indeed, there seems ground for suggesting that an ancient usage or custom is formed, having the effect of abrogating the part of the common law, which imposed on freeholders the duty of rendering fealty.

Nevertheless, as the common law on this point has never been repealed, and as I wish to show clearly the original character of tenure, I think it well now to describe the common law forms in respect of fealty.

Supposing a lord of a manor willing to receive, and a new freeholder willing to do fealty, the suitors at the next court baron would present the change of tenants by descent or purchase; and the new tenant would then, in a form prescribed by law, swear to be a faithful tenant to the lord of the manor. He would also pay any relief which might be due. Minutes would be made on the court roll of the presentment, of the fealty done, and of the payment of the relief. If there happened to be any accruing heriot, there would also be a presentment of its falling due.

Upon any change of the lord by descent or purchase all the freehold tenants should do fealty to the new lord.

I have never met with an instance of fealty being done by a freeholder. I have several times seen it done by copyholders; but the more usual practice is to respite a

new copyholder's fealty, making, on the court rolls, an entry to that effect.

7. Wardship.—If a person, who inherits a freehold, is under the age of fourteen years, his next of kin, not capable of inheriting the land, is called his guardian in socage, and has the wardship and custody of his person and estate until he attains the age of fourteen years. The law will not entrust the care of an infant freeholder to a person who, being capable of being his heir, might be benefited by his death.

To you what I have just said needs explanation. It is a part of our law of inheritance, that no person can take land by descent, unless he is of the blood of the last purchaser, that is, of the person who last acquired the land by buying it, or by the will of a former owner, or in some other way than descent.

Now when an infant inherits land from his father, or from any ancestor of his father's blood, it is manifest that the last purchaser must have been either his father, or some person of his blood; and the law therefore excludes from the possibility of descent the infant's mother and all his kin on her side, for none of them are of the blood of the last purchaser. In such a case the infant tenant's mother if living, or if she is dead, his next of kin of her blood is his guardian in socage.

So if a descent to a person under the age of fourteen years is from his mother or some ancestor of her blood, the guardian in socage is the infant's father if living, or if he is dead, the next of kin of his blood.

A guardian in socage is bound, when his ward attains the age of fourteen years, to account to him for the profits of the land.

By reason of the exercise, by most persons of property, of their power to dispose of their lands by their wills, thus making descents less frequent than formerly, and by reason of the frequent exercise of the powers which all fathers have to appoint guardians of their children until they attain

the age of twenty-one years, thus superseding the powers of all other guardians, there are in practice but very few instances of the powers of guardians in socage coming into existence.

8. Escheat.—The right called escheat, the right of the lord of a fee to resume the lands of a tenant dying without heirs, is, as I have said before, incident to every sort of tenure.

Until the reign of Henry the Eighth no freehold lands could, except by the custom of gavelkind, or some other local custom, be disposed of by will. Acts of parliament, then made, enabled a landowner to dispose by will of two-thirds of his land holden by knight-service, and the whole of his land holden in socage. One effect of the Statute of Charles the Second converting the military tenure into socage was, as was manifestly intended, to give every freeholder full power to devise all his lands by will. Thus is the chance of escheat, for failure of heirs, reduced to almost nothing. Not to speak of the general practice for men of property to make their wills, it is to be supposed that any owner of land, happening not to have an heir or a known heir, will make a will, disposing of his property in favor of some friend, rather than leave it to escheat to the lord of the manor, perhaps a stranger in whom he takes no interest.

The severity of the common law as to forfeiture in the case of a person guilty of treason or felony was very great. All the personal property and all the lands of a person attainted of treason, of whomsoever holden, were forfeited to the Crown absolutely; and all the lands of a felon escheated to the lord of whom they were holden, subject, if they were holden of any other lord than the Crown, to a forfeiture to the Crown for a year and a day during which any waste, such as the destruction of buildings and the cutting down of timber was lawful. The Crown was said to have a year, day and waste.

If a person convicted of felony afterwards survived another

person whose heir he would otherwise have been, he was incapable of being the heir, and his ancestor's land escheated. Moreover, a felon's blood was said to be corrupted, and none of his descendants could, by tracing their descent through him, be the heir of any other person. Land conveyed to a convicted felon escheated.

The common law of forfeiture and escheat might inflict upon the innocent families of criminals great hardships, which are now to some extent prevented by three comparatively modern acts of parliament.

Late in the reign of King George the Third, a statute (*a*), leaving untouched the law of forfeiture and escheat in cases of treason and murder, reduces the duration of a title by escheat for any other felony than murder to the natural life of the criminal; so that upon his death the lands return to the same course of descent, as if he had not been attainted of felony.

A statute, which I have mentioned before, made in 1833 (*b*), for the amendment of the law of inheritance, takes away the effect of corruption of blood as an impediment to a descent to the issue of a deceased felon.

It often happens that the legal owner of land, the actual tenant of the freehold, has it only as a trustee for others, or as a security for money lent by him on a mortgage. Now as the common law of forfeiture and escheat dealt only with the legal ownership, the actual freehold tenancy, the land might escheat by the death of the trustee or mortgagee without heirs, or might be forfeited or escheat by his being attainted of treason or felony. To prevent this injustice to innocent persons, objects of the trust or persons mortgaging their estates, a statute was made in 1834 (*c*).

When an escheat of freehold land happens by a failure of heirs or by an attainder of felony, the Crown, of which all land is presumptively holden, has the benefit of it, unless

(*a*) 54 George III., chapter 105.
(*b*) 3 & 4 William IV., chapter 106, section 10.
(*c*) 4 & 5 William IV., chapter 23.

the presumption can be rebutted by proof of the land escheated being holden of a manor or borough, in which case the lord of the manor or of the borough has the benefit of the escheat. Immemorial payment of rent might be one proof of tenure.

Escheat is, forfeiture is not, a consequence of tenure. Forfeiture is a penalty for a crime; escheat is the title of the lord to resume the feud of an unworthy vassal.

Forfeiture for treason, over-riding the lord's title by escheat, supplied, when the relation of lord and freehold tenant was more of a reality than it has become, a motive to the lord to prevent treason on the part of his tenants.

Both forfeiture and escheat are a sort of security for good order, supplying a motive to men to abstain from crimes, lest detection should involve their families in ruin. In modern legislation, as we have seen, this last point is disregarded, except with reference to treason and murder.

It is usual for a person committed for trial for felony, and having property, to convey it to trustees for the benefit of his family, to avoid the loss of it by forfeiture or escheat consequent on a conviction.

Land conveyed to a corporation, not having a licence to hold in mortmain, escheats.

Having thus, for your instruction, reconsidered the consequences, actual and possible, of our modern lay freehold tenure, namely, services, rents, reliefs, heriots, suit of court, fealty, wardship and escheat, I arrive at this conclusion, that the features of freehold tenures are becoming, in practice, so rare that the condition of an English freeholder is now nearly that of an allodial owner.

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